No. 93.

Brief of Stevens for D. C.

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Oct. 28, 1897.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH,

Defendant in Error.

Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

H. F. STEVENS,
Counsel for Defendant in Error.

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STATEMENT OF FACTS.

In controverting as we do, to some extent, the statement of facts set out in brief of counsel for plaintiffs in error, we expressly disclaim any purpose to charge an intentional misstatement by him but attribute the errors which we assert to exist therein to the fact that he has but recently become connected with the litigation and that the agreed statement of facts upon which the case was tried and determined the last time at the circuit and which was prepared by his predecessors, is somewhat meager upon the points in respect to which the unintentional errors have occurred. But as we deem them

vital we take the liberty of here calling attention to them and also of supplementing the statement by the addition of other facts which we consider material.

In the first place, upon page 1 of his brief, referring to the property in dispute counsel says, "in fact, it is, and has been since the construction of the Northern Pacific Railroad, occupied by the main and yard tracks of that road in Bismarck." Nothing of the kind appears in the record and it is not true in fact. Upon the first trial, which was to a jury, the contrary expressly appeared and it was shown, without contradiction that none of the tracks were *ever* upon any portion of these premises, but that the same have been chiefly occupied by business blocks and stores belonging to tenants of the company.

The present record contains nothing upon the subject except as follows. (Trans. Findings of Fact, p. 16):

> "In the year 1873 the railroad was constructed across this *tract*, (referring to the 80-acre tract upon which the town of Bismarck was platted) and has since remained and been operated upon it. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map, filed to definitely fix this line, and have been occupied by the defendant, *through its tenants*, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes."

In the second place, counsel says, upon page 3 of his brief:

> "*Note* that no selection or entry was made by the *Town* authorities, and no proceedings instituted in the land office (so far as the record shows), prior to patent July 21, 1879."

And again on the same page he says:

> "The entry in the land office on which that patent was based was made September 14, 1876."

We submit that the record nowhere shows when the entry was made, further than by the statement in the findings of fact (Trans., pp. 15 and 16), that it was entered "under the town-site act (R. S. sec. 2387)" and "the eighty (80) acre tract on which these lots were situated was selected as the location of a portion of this town-site and surveyed prior to June 20th, 1872. * * * By the first of January, 1873, thirty buildings had been erected on the town-site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. * * * It was upon the town-site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based."

In the third place, counsel says, upon page 3 of his brief, "During 1872 some grading was done on the main line." The record states, (Findings of Fact, Trans., p. 16):

> "During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one quarter of a mile west of the west line of this 80-acre tract, extended south to its intersection with the grading."

In the fourth place, counsel says, upon page 3 of his brief:

> "During 1872 the company staked out a line across the *property* in question substantially where the track was afterwards built. This line was graded in 1873, and in June, 1873, the track laid where it has ever since been."

The record states, (Findings of Fact, Trans., p. 16):

> "During the year 1872 there was a line staked out across this *tract*, (the 80-acre tract above referred to—*not the property in question*) *substantially* where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873

the railroad was constructed across *this tract*, and has since remained and been operated upon it."

In the fifth place, the abstract by counsel, upon page 4 of his brief, of the complaint and demurrer in the action seems to us to inadequately present the question of estoppel. They are given in full in the record (Trans., pp. 12, 13) and we invite special attention of the Court to the particular language of each and to the discussion thereof hereinafter contained.

In the sixth place, counsel quotes, upon pages 5, 6 and 7, of his brief, sections 2 and 3, as being the only material parts of the charter of the railroad company. In our opinion other sections and parts of sections are material, and we quote them as follows:

> Sec. 1. "* * * And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound. * * *"
>
> Sec. 2. "And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation

within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

Sec. 3. "And be it further enacted, that there be and is hereby granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time *the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.* * * *"

Sec. 4. "And be it further enacted, that whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to, the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with said completed section of said road. * * *"

Sec. 5. "And be it further enacted, that said Northern Pacific Railroad shall be constructed in a substan-

tial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform guage shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. * * *"

Sec. 6. "And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company as provided in this act. * * *"

Sec. 7. "And be it further enacted, that the said 'Northern Pacific Railroad Company' be, and is hereby authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road; * * * And in case the owner of such lands or premises and the said company can not agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners. * * * And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of said railroad, and may institute proceedings, in manner de-

scribed, for the purpose of ascertaining the value of, and of acquiring the title to, the same."

Sec. 8. "And be it further enacted that each and every grant, right and privilege herein are so made, and given to, and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six."

Sec. 9. "And be it further enacted, that the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

Sec. 15. "* * * And the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road."

Sec. 17. "And be it further enacted, that the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon, said company by the congress of the United States, by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or asistance, to its own use for the purpose aforesaid."

Sec. 18. "And be it further enacted, that said Northern Pacific Railroad Company shall obtain the consent

of the legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature."

The following statutes are also deemed material to the determination of the case;

(R. S. U. S. § 1851.)
"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interferring with the primary disposal of the soil."

(Revised Codes of Dakota, 1877) § 168.
"The legislative assembly can pass no law interfering with the primary disposal of the soil."

Id. § 298. "The judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action."

Id. § 581. "Occupancy for any period confers a title sufficient against all except the territory and those who have title by prescription, accession, transfer, will or succession."

Id. 635. "Ejectment. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Id. 638. "Joinder of defendants. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff he may have a writ for the possession of the premises, as against the defendants in the action against whom judgment has passed."

U. S. R. S. Sec. 2288. "Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the homestead law, or

any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes *or for the right of way of railroads* across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their pre-emptions or homesteads."

Rule 8 of this Court provides for the transmission here of "a copy of the opinion or opinions filed in the case." Notwithstanding this rule, the opinion of the Circuit Court of Appeals, upon the first appeal in this action, and which covers the more important of the questions involved, appears not to have been transmitted. We therefore give it in full as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

Eighth Circuit.

No. 201.—May Term, A. D. 1893.

PATRICK R. SMITH,

Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of North Dakota.

Mr. H. F. Stevens, for Plaintiff in Error.

Mr. Fred. M. Dudley (with whom upon the brief was Mr. J. H. Mitchell, Jr.), for Defendant in Error.

Before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge.

Sanborn, Circuit Judge, delivered the opinion of the Court.

The principal question in this case is whether, as against one holding title under a patent of the United States which contains no reservation of right of way to the company, the right of way granted to the defendant, the Northern Pacific Railroad Company, by the act of Congress entitled, "an act granting lands to aid in the construction of a railroad and telegraph line

from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, (13 Stat., ch. 217, p. 365,) attached to a tract of land two hundred feet in width on each side of its railroad as actually constructed where the railroad as constructed crosses the land in question but the line of its definite location shown on its map filed for that purpose with the Secretary of the Interior and accepted by him does not cross it but passes about two miles south of it.

The property in controversy is eight lots in the City of Bismarck, in North Dakota, which were a part of an eighty-acre tract of land that was entered by John A. McLean, as mayor of that city, in behalf of its inhabitants, under the Townsite Act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21, 1879. The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff. The eighty-acre tract on which these lots are situated was selected as the location for a portion of this townsite and surveyed prior to June 20th, 1872. In the year 1872, the attorney of the Lake Superior and Puget Sound Land Company —the company that first made this selection—commenced, and thereafter continued, to sell lots upon this townsite according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the Register of Deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the townsite, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the townsite thus selected and the plat thus made, which were afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and it contained no reservation of any right of way to the Northern Pacific Railroad Company.

On February 21, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri River. This route passed about three-quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, and he accepted, its map fixing the definite location of its line. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872, grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872, there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873, the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line. Upon these facts the court below instructed the jury that the lots were subject to the right of way of the company and directed a verdict in its favor on that ground.

Section two of the charter of the Northern Pacific Railroad Company provides:

"That the right of way through the public lands be, and the same hereby is, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; * * * said way is granted to said railroad to the extent of two hundred feet in width on

each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations." 13 Stat., ch. 217, p. 367.

Section three of this charter contains a grant to the company of "every alternate section of the public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

Section four provides that whenever the company shall have twenty-five consecutive miles of its railroad and telegraph line ready for use, the President shall appoint three commissioners to examine it, and if they find and report that the twenty-five consecutive miles have been properly constructed, "patents of the land as aforesaid shall be issued to the said company, confirming to the said company the right and title to the said lands situate opposite to, and coterminous with, said completed section of said road." This act was approved July 2, 1864.

That the grants of the right of way and of the lands in aid of the construction of this railroad were grants in praesenti; that they vested in the company the present right to the lands and easements thus conveyed; that these grants were afloat and attached to no specific land until the line of the road was "definitely fixed," and that whenever the line of the railroad was "definitely fixed" the selection of the lands and of the right of

way was thereby made, and the right to lands and easements thus selected vested in the company as of the date of the approval of the charter, are propositions now too well settled to admit of discussion. Railroad Company v. Baldwin, 103 U. S. 426; Grinnell v. Railroad Company, 103 U. S. 739; Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629: St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad Co., 139 U. S. 1; Sioux City & I. F. Town Lot and Land Co. v. Griffey, 143 U. S. 32.

It is also well settled that so far as the land grant is concerned the line of the railroad was "definitely fixed" by the filing with, and acceptance by, the Secretary of the Interior of the company's map of its line of definite location. The company thereby exhausted its right of selection and so firmly anchored the land grant to this fixed line of its own choosing that it could not thereafter change or vary it without legislative consent so as to affect titles accruing thereunder or in any way affected thereby. Thus in Van Wyck v. Knevals, 106 U. S. 360, 366, Mr. Justice Field, in delivering the opinion of the Court, said:

"The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

In Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 634, Mr. Justice Miller, in delivering the opinion of the Court, said:

"The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is in law bound to report its action by filing its map with the commissioner, or rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party."

And in Sioux City & I. F. Town Lot and Land Co. v. Griffey, 143 U. S. 32, 39, Mr. Justice Brewer, delivering the opinion of the Court, said:

"The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the Government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the land grant are concerned, is its line definitely fixed; and it cannot thereafter, without the consent of the Government, change that line so as to affect titles accruing thereunder."

These decisions seem to be broad enough in terms and positive enough in language to settle the question here presented. But it is said that the question now before us involves the limits of a right of way and that the decisions referred to were rendered in cases involving land grants in aid of the construction of railroads. This is true, but it is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed under the act of congress by filing its map of definite location and yet be subject to another and subsequent definite fixing on a different line by its actual construc-

tion, for this is simply to say that a line which is "definitely fixed" is indefinitely changeable; nor is it perceived how this act of Congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant and another and a parallel line for the purposes of its right of way.

It is said that the grant of the right of way reads, "said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain," while the grant of lands in aid of the construction reads "to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land on each side of said railroad when it passes through any state," and hence that the former grant refers to the constructed railroad and the latter to the line of definite location on the map. But this argument is hypercritical. It proves too much. It proves that the land grant itself is to be measured from the line of definite location fixed on the map in the territories and from the constructed railroad in the states, for the grant is of twenty alternate sections "on each side of said railroad line" in the territories, and ten alternate sections "on each side of said railroad" in the states. The fact is that the words "railroad" and "railroad line" are here used interchangeably as synonymous terms and no special significance attaches to the use of the one or the other.

It is said that the completed railroads frequently deviate from their lines of definite location as fixed upon their maps on account of unforseen obstacles to construction, that Congress must have known this fact and must have intended that this right of way should follow the constructed road and not the

line fixed upon the map. Conceding the existence of the fact of the frequent deviation of railroads from their fixed lines and that Congress was aware of this fact it made ample provision for this deviation in section seven of the act by giving to this company the power of eminent domain. The company was given the power to condemn its right of way whenever it desired to deviate from its fixed line. On the other hand, there are many provisions in this act that indicate that it was the purpose of Congress to have the railroad actually constructed on the line the company fixed by this map and to limit the right of way granted to the two hundred feet on each side of that line. It was in the contemplation of Congress when this act was passed that this company would first file a map showing its general route, that upon the filing of this map the lands within forty miles of the route thus indicated should be withdrawn from entry for homesteads, from preemption and from sale by the Government until the company could survey, select and definitely fix the line on which it proposed to build its railroad. (Section 6.) The company filed the map of its general route through Dakota Territory east of the Missouri River in February, 1872, but it did not file its map of the definite location of its line until May, 1873. Why was this delay contemplated, and why was the line of the railroad required to be "definitely fixed" by a public record made and filed by the company? In our opinion there were at least three objects to be accomplished by the filing of this map: First—That there might be a public and permanent record of the fixed line of this railroad and thus of the limits of its right of way; Second—That the definite location of the line of the railroad might be known to the Secretary of the Interior and furnish the call for his adjustment of the land grant; and Third—That the date of the filing of this map might furnish a date for the determina-

tion of the validity of pre-emption, homestead and other rights. If the sole or main purpose of the map of this line of definite location was to furnish a call for the land grant or a date for the determination of the validity of rights that had accrued, and it was the intention of Congress that the railroad when actually constructed and the right of way granted might be located elsewhere, no accurate survey, no great delay was necessary. The exact limits of the land grant twenty miles distant from the line of the railroad were of little importance. They might have been fixed without material loss to the company by any engineer, without leaving his office, by drawing a straight line upon a map of the country from some fixed point upon the Red River of the North to another on the Missouri River, and certifying that as the fixed line of the railroad. But the main purpose of requiring this line to be definitely fixed was not only to furnish a call for the land grant, but also to provide a permanent record of the line of the railroad and the limits of this right of way. Hence it was that some delay in definitely fixing the line was contemplated. Congress intended that the engineers of the company should have ample opportunity to carefully survey the practicable lines of construction along the general route, to discover any obstacles to the construction of the road on these lines and avoid them, and when all this was done that the company should definitely fix its line of railroad, that it should irrevocably choose, and by filing its map of definite location announce its choice of the line on which it elected to construct its road, and along which it would exercise the right of way and the right to the necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn tables and water stations granted to it. It was vital to the success of the enterprise that the limits of this right and the location of these grounds

should be carefully selected. A line of construction definitely fixed without careful preliminary surveys might be ruinous to the company. All this the company undoubtedly fully appreciated. It appreciated the purpose and effect of definitely fixing this line. It took ample time to make experiments and accurate surveys of many lines and to make a careful and wise selection. It did not file its map showing the definite location of its line until May, 1873; until more than a year after its general route had been selected. It did not file this map until after it had carefully chosen and surveyed its line and partially graded its railroad upon it past the townsite on which the lots in question are situated. The selection was made by its own officers in its own time, after every opportunity had been afforded it to make a satisfactory choice, and we think it exhausted the right of selection given by the act of Congress and definitely and irrevocably fixed the line of this railroad and the limits of the right of way granted to it as against third parties holding under patents of the United States.

It is said that the decision and report of the commissioners appointed under section four of the act, that the railroad and telegraph line of the defendant had been completed in good, substantial and workmanlike manner and as in all other respects required by the act, and the approval of that report by the President, constitute a judicial determination that this railroad was constructed where it should be; that this is the decision by a special tribunal of a matter confided to it; that it cannot be attacked collaterally, and that as the United States have waived all objection to the location of the constructed road, the plaintiff holding under them cannot attack it. But the question now presented is not whether the railroad company had twenty-five consecutive miles of railroad and telegraph line ready for the service contemplated when these com-

missioners reported, but whether the right of way granted to the defendant was limited to the two hundred feet in width on each side of the line of railroad "definitely fixed" by its map and partially graded, or whether it extended over a tract two hundred feet in width on each side of the line of railroad on which it is now operating, two miles north of and parallel to its fixed line. This question never was confided to the commissioners for their determination and never was decided by them. The question they were authorized to consider and determine was whether or not the railroad and telegraph line were constructed in a substantial and workmanlike manner so that they would be serviceable for the purposes of their construction, whether they were "ready for the service contemplated," not whether the title of the company to the lands on which they were constructed was obtained by the grant of the right of way or by the exercise of the power of eminent domain or had not been obtained at all. Moreover, if there was any commissioner or tribunal charged with the duty of determining the question now presented, it was the Commissioner of the General Land Office, and his issuance of the patent to the land in dispute to the plaintiff's grantor without any reservation of the right of way to the defendant would be a conclusive adjudication that these lands were not subject to any such right of way. (Quinby v. Conlan, 104 U. S., 420; Smelting Co. v. Kemp, 104 U. S., 636). It is unnecessary to consider in this case what effect, if any, the action of the commissioners who examined this railroad and of the President who approved their report would have if the question regarding this right of way arose between the company and the United States alone, and we express no opinion upon that question. But as against this plaintiff holding under a patent issued by the United States to his grantor without any reservation, when the public record made by the

company of the definite location of its line two miles south of this land remained unchanged and without amendment, we are clearly of the opinion that such action was without any effect.

It is said that the right of way granted by this act should be held to extend for two hundred feet on each side of the center line of the main track of the railroad as originally constructed. It is not claimed that this right of way has been swung to the north and to the south from time to time as the company has since changed its main track, as it must frequently have done, especially in large cities where it has many tracks. It is not claimed that the company has ever amended its map of the definite location of its line to show where the line originally constructed was, or that there is any public record anywhere from which its location and the limits of this right can be learned. The only way these can be discovered now is from the testimony of the few witnesses who have knowledge of where the main track was laid twenty years ago, and the death of these witnesses will soon compel a resort to evidence still less reliable. Lots and lands in this country are bought and sold on the faith of the public records. If this right of way is not anchored to the line fixed by the map of this company, the record of that map must prove a constant snare to purchasers of lands near this railroad. It is no answer to this position to say that the railroad is visible on the land it traverses because it is common knowledge that lands are frequently bought and sold without a view of the premises, and because no view of the premises now could determine where the main track was twenty years ago. We are unable to pursuade ourselves that Congress ever intended to leave the location and limits of this right of way so undefined and undefinable.

After the most careful consideration of this case we are unable to find any reason for the rule adopted by the Supreme

Court that the line "definitely fixed" by the map furnishes the only call for the adjustment of the land grant, that is not equally cogent and convincing to prove that it also furnishes the call for determining the limits of the right of way. If it does not do so, the filing of the map does not "definitely fix" the line of the railroad at all, but leaves it indefinite and liable to be changed by the actual construction of the road. It was not essential to the adjustment of the land grant that the line of the purposed road should be definitely fixed after careful surveys, but it was vital to the interests of the company in its right of way and its right to grounds for buildings and improvements that its line should be carefully selected and definitely fixed where the railroad could be economically constructed upon it. Patents issue to the company for the lands granted after the adjustment of the grant, and the map of definite location grows less valuable as a muniment of the title to these lands, but no patents issue for the right of way and the only record that defines or evidences the limits of that right is this map. It is of paramount importance that there should be a public record accessible to all from which the extent and limits of this right may be ascertained. It would be intolerable that so valuable a right should be disconnected, as defendant's counsel claim it is, from the line definitely fixed by the map of the company, should attach itself to the center line of the main track of the railroad as originally constructed twenty years ago, and should have no muniment of title but the uncertain memory of witnesses of its construction to fix its limits.

The result is, that as against one holding under a patent of the United States without reservation, the right of way granted to the Northern Pacific Railroad Company by the act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route,"

approved July 2, 1864 (13th Stat., ch. 217, p. 365), is limited to two hundred feet in width on each side of the line of railroad "definitely fixed" by the company's map of definite location filed May 26, 1873, and as the lots in question were not within these limits they were not subject to the defendant's right of way, and it was error for the Court below to instruct the jury to return a verdict in its favor.

It is unnecessary to notice other assignments of error because the questions presented by them may not arise on a second trial. The judgment below is reversed with costs, and the cause remanded with instructions to grant a new trial.

Filed October 16, 1893.

A true copy.

Attest:

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

It is conceded, as we understand, by counsel for plaintiffs in error, that the statement upon page 19 of his brief, as follows: "Here the railroad company in the former action, as it had a right, made a specific allegation in its complaint that it was the corporation created under the act of July 2, 1864, and that the premises in question were by that act granted to it by the United States as part of its right of way," is an inadvertance. There was no such allegation.

ARGUMENT.

QUESTION OF TITLE.

The grading of the line, followed by adoption of the same as the line of its definite location and the filing and acceptance of the plat thereof by the commissioner of the general land office. May 26, 1873, definitely and finally fixed the right of way of the plaintiff in error and exhausted its rights in the premises, as against one holding under patent of the United States.

We have some doubt as to the necessity, if not the propriety, of discussing and supporting by other authorities propositions which, as we understand it, have been finally and completely established by recent decisions of this Court. We understand that the three cases of M. K. & T. Ry. v. Cook, 163 U. S. 491, Hardy v. Johnson, 1 Wall. 371, and Cromwell v. County of Sac., 94 U. S. 351, settle every question involved in this case, and we do not expect that the numerous authorities which we have cited will be useful otherwise than as furnishing instances in which the doctrines established by those decisions have been applied. But, inasmuch as counsel for plaintiffs in error has set us the bad example, we are impelled to follow it. Whether or not the case of Missouri, Kansas & Texas Railway Company v. Cook, was argued orally in this Court for plaintiff in error, it is apparent from an inspection of the briefs of counsel in that case, that the matter was fully presented to and considered by the Court, and the opinion leaves nothing to be said, except to apply the rules there established to the case at bar.

In the brief for plaintiff in error in that case, all the authorities quoted by counsel for plaintiff in error here were quoted more fully, and many more authorities were cited than are contained in his brief.

An attempt is made, however, to distinguish that case from

the case at bar, chiefly because of alleged difference in situation of the adverse party at the date of change of location of the railroad. That there is a distinction between the cases we admit, but we think it is in our favor. The statute in question in the Cook case (14 Stat. 289), although it refers to the "time when the line of said road is definitely fixed," did not, as does the Northern Pacific act, expressly, provide for *first* fixing, the *general route*, upon a map of which the lands granted in aid were to be withdrawn from entry, and, *second*, a filing of a map of *definite location*, after the line was definitely fixed, but only for one map, and the provision in that respect was as follows: "That as soon as said company shall file with the secretary of the interior maps of its line, *designating the route thereof*, it shall be the duty of said secretary to withdraw from the market the lands granted by this act." The grant of right-of-way was in the identical language of the Northern Pacific act, "Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain." It appeared, however, that a line was surveyed and a map thereof filed, from which the granted lands were withdrawn from market. The court, Mr. Chief Justice Fuller, delivering the opinion, say:

> "In the instances of many of the land grants, the acts contemplated a preliminary designation of the general route by map filed in the department of the interior, upon which the lands were withdrawn, but the grants only took effect on a subsequent designation of the definite location of the line of the road. Railway Co. v. Dunmeyer, 113 U. S. 629; U. S. v. Southern Pac. R. Co., 146 U. S. 570. But this grant made no provision for any preliminary surveys and maps, and the only map provided for was that mentioned in section 4, being, as stated, a map of 'its line designating the route thereof.' We think that, by the filing of the map of the line sur-

veyed, the route was definitely fixed, within the intent and meaning of the act; and, while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court."

In thus deciding, the court evidently adopted the rule which, as will hereafter appear, had often been applied to such grants, of resolving any doubtful provisions against the grantee, and held that, inasmuch as the act contemplated that the line of the road should be "definitely fixed," and the filing of a map of the line, "designating the route thereof," and did not provide for the filing of any other map, it was *reasonably to be inferred* that "it also operated, and could not otherwise than operate to definitely locate the line and limits of the right of way."

But in *this* case we have express reference in section 6, (*ante.* p. 6) to *first fixing* the *general* route, and in section 3 for the *definitely fixing* of the line of the road, and the filing of a map thereof. Is not that which was *reasonably inferred* from the act in question in the Cook case, *necessarily implied* from the language of the Northern Pacific act?

Counsel at page 15 of his brief, after quoting from the opinion of the court in the Cook case, "The same conclusion necessarily followed in respect of the right of way," asks "why necessarily followed?" Without intending to imply that the opinion itself does not sufficiently answer this question, we take the liberty to suggest as follows:

The grant of lands in aid was (*ante*, p. 5) of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on

each side of said railroad line as said company may adopt," not previously disposed of or reserved "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office."

This, surely, contemplated that when the plat was filed it should be certainly known what lands passed to the company under its grant in aid and what became open to settlement. Does it not as *surely* and *necessarily* follow that it should be certainly known at the same time what lands passed to the company under its grant of right of way and what became open to settlement and improvement, free from that right of way? *More necessarily*, we assert, because, at all times, it was known that *even-numbered* sections were open to settlement out of the territory of the lands granted in aid, both before and after the plat was filed, but, as to the right of way, there was no such assurance until that plat was filed, and not a house or store or factory could be erected or a street laid out without liability of dispossession when that plat should be filed, and this reason was succinctly and sufficiently stated by the court when it said, in the Cook case:

> "The grant of the lands and the grant of the right of way were alike grants *in praesenti*, and stood on the same footing; so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right-of-way for the proposed road. The easement and the lands were afloat until, by definite location, precision was given to the grant and they became permanently fixed."

The conclusion also "necessarily followed" from the unambiguous language which the court had just quoted from the opinion in the case of Van Wyck v. Knevals, 106 U. S. 360, as follows:

> "The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established. It is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route."

It likewise "necessarily followed" from the plain meaning of the words employed in the act, as stated by the Circuit Court of Appeals, (*ante*, p. 15):

> "It is not perceived how the line of this railroad can be consistently held to be definitely and unalterably fixed under the act of congress by filing its map of definite location and yet be subject to another and subsequent definite fixing on a different line by its actual construction, for this is simply to say that a line which is "definitely fixed" is indefinitely changeable; nor is it perceived how this act of congress can be held to give the company the power to select and definitely fix one line of railroad for the purposes of its land grant and another and a parallel line for the purposes of its right of way."

No better illustration of the propriety of such a holding could be given than is afforded by the case at bar. Here it appears (Findings of Fact, Trans., p. 16) that on February 21st, 1872, the company filed a map of its general route, which pass-

ed about three-quarters of a mile south of this eighty-acre tract, which "was selected as the location of a portion of this town-site and surveyed prior to June 20, 1872. * * * That by the first of January, 1873, thirty buildings had been erected on the town-site, *and from that time until the patent issued the population of the city and the improvements in it continued to increase.*" Of course the improvements made prior to filing the map of definite location were made subject to risk of dispossession, should the line indicated by that map prove to be upon the land thus improved. But all improvements made *after that date* must be presumed to have been made upon the faith of that location, and this court will presume, if necessary, in support of the judgments of the courts below, and the presumption arising from the issue of the patent, and in the absence of anything in the record to the contrary, that the rights of defendant in error attached at the proper time.

As to the claim of counsel that this case is to be distinguished from the Cook case, because there it appeared that the entry in the local land office was made intermediate the filing of the plat and the change of location, while here, as he claims, at page 18 of his brief, "the road was built on the ground where it now is and the right of way was in the possession of the company, trains had been running over it for many years before the entry was made and patent issued under which defendant in error claims," we have to say as follows:

In the first place, we submit that there is nothing in the record to show when the entry was made, but it does show that possessory rights attached to this eighty-acre tract before the change of location, and in Ashby v. Hall, 119 U. S. 526, the court in a

case involving this "Town-site Act" (R. S. § 2387) distinctly recognized the existence of such possessory rights, saying: "*The plaintiffs and their predecessors in interest had made valuable improvements upon the lots, to which they held a possessory right at the time of the entry of the town-site*" and "The act required the entry of land settled upon and occupied, to be in trust 'for the several use and benefit of the occupants thereof according to their respective interests.'" Unlike a homestead or pre-emption claim, where the *entry* is the inception of the right, an entry under the townsite act is only a step in the line of perfecting rights thereunder, and the issue of the patent precludes a denial that those rights existed.

In the second place, counsel has again confounded the location of the tracks, "across this tract" (80-acre tract) with the premises in question, which lie *north* of the tracks *and upon which no portion of the tracks is or ever was located.* (See *ante*, p. 2.)

In the third place, whatever may be the difference in respect to time of attaching of rights of defendant in error, the Cook case expressly holds that "the issuing of the patent shows that the land department had found the existence of all the conditions, such as actual occupancy of and residence on the premises and like matters requisite thereto, and it took effect by relation as of the date of the certificate." (In this case under the "town-site act," from the commencement of occupancy). "It follows that, as the rights of the settler were acquired after the right of way of the road had been *definitely located*, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain."

Counsel claims another distinction between that case and

this, on the ground that "the stipulation of facts in that case contained this clause: 'But the route of said road on its present location has never been approved by the President of the United States, unless such approval is shown by the other facts herein admitted.' There were no facts stated in the stipulation which showed any action by the President approving the constructed line," while section four of the Northern Pacific act (*ante*, p. 5) provided for such action, which was taken in respect of the portion of the constructed road here in question. This argument, however, is fallacious, because it appears from the opinion in the Cook case that, at the date of the passage of the act there construed (14 Stat., 687), the land there in question was part of an Indian reservation, and was not ceded to the United States until the following year; wherefore, it was, in that act, with great propriety,

> "provided, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States."

Thus, in that case, the grant of the right of way was, in express terms, and for an obvious reason, made subject to the approval of the treaty-making branch of the government. In the case at bar no such provision was made, and no such reason existed as we shall hereafter endeavor to show.

Let us, for a moment, divest this case of its technicalities and consider it as if it were an ordinary transaction between two individuals. Let us suppose that A, owning a large tract

of land, grants to B a right of way, 20 feet wide across A's land, upon a line to be selected by B, upon condition that B, within a specified time constructs and thereafter maintains thereon a first class wagon road, and, by the same instrument, grants him every alternate 40 acre tract within 2 miles of the road and agrees to convey it coterminously with the construction of the road, except such as A might sell to others or reserve for watering places, before B had located his road and filed a plat of the definite location thereof in the office of the register of deeds. That would be a grant of a right of way upon two *express* and one *implied* condition, viz.: 1. That B should select the line of the road. 2. That he should construct and maintain it, and 3. That B should file the plat. It would also be a grant of lands *with* reservations and exceptions. The first grant would be *without* reservation or exception *as to the route B might select*, but it would not be without limit as to the *number* of routes he might select. Would the court hesitate to so construe the instrument? That such a construction must be given has been repeatedly held.

And, if that would be the case between two individuals, where the rule is to construe the grant most strongly against the grantor, what difficulty should there be in arriving at the same conclusion with respect to a government grant, which is to be construed most strongly against the grantee?

The following cases well illustrate the application of the doctrine of *election*.

> "As to the location of the gates, we have seen that defendant has a discretion; it may elect, in its discretion to locate them at one point or another, but the election being made, the discretion is determined and the gates become fixed and immovable. In such case the doctrine of election applies in full force. The defendant has been permitted to locate its gates at its discretion; to that it was entitled. But the charter does not permit it

to change their location. It is to the interest of the public that they be permanent, and in case of election the rule is 'if a person once determines his election, it shall be determined forever.' Com. Dig., title 'Election,' ch. 2, Co. Litt. 145a; State v. Turnpike Co., 10 Conn., 163; Turnpike Co. v. Hosmer, 12 id. 364; Griffin v. Horn, 18 I. R. 397."

L. & N. Turnpike Co. v. N. & K. T. Co., 2 Swan (Tenn.) 282.

"The charter authorizes the company to erect and establish a gate, that is, fix, settle or confirm it. It is, then, to be erected and permanently confirmed in the place these proprietors shall determine."

[In the case at bar the defendant was authorized (*ante*, p. 4), to "locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route *as shall be determined by said company.*"

"And in the year 1796 they did determine that it should be fixed or established at the iron works. It would seem, then, that they had completely executed the power and exhausted it. It is said further that it is to be placed where they shall judge it convenient; and that circumstances may make one place convenient at one time and another place at another time. But if it was intended that this should affect the power, nothing would have been more easy than to have added 'and the same vary from time to time, as convenience may require.' So far from this, the terms used do not import such an authority."

State v. Norwalk & Danbury Turnpike Co., 10 Conn. 157.

We now urge a careful examination of the pertinent provisions of the Northern Pacific act, bearing in mind two cardinal

rules of construction: 1. That an act is to be construed by considering together all of its parts and provisions and giving to language its ordinary meaning, and, 2. That grants of this character, if the language be doubtful, are to be construed most strongly against the grantee.

By section 1 the corporation was authorized and empowered to (1) lay out, (2) locate, (3) construct, (4) furnish, (5) maintain, and (6) enjoy a continuous railroad and telegraph line. Not only under established rules of construction are we to ascribe significance to each of these expressions, but their clear and unambiguous meaning and logical sequence are of controlling effect. The line was (1) to be "*laid out*" from Lake Superior to Puget Sound. This was prescribed in view of the provisions of Sec. 6, "that the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the *general route shall be fixed.*" The line was (2) to be "*located.*" This was in view of the provision in Sec. 3 as to "the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." The road was then (3) to be "*constructed*" This was in view of the provisions of Sec. 5, "that said Northern Pacific Railroad shall be *constructed* in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places and all other appurtenances, * * * with rails of the best quality, manufactured from American iron. And a uniform guage shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description." To determine whether the road had been so *constructed*, and for no other purpose, provision was made in Sec. 4 for the appointment and report of commis-

s'oners. It was then (4) to be "*furnished.*" This was in view of the provisions of Sec. 5, as follows: "Including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business." It was then (5) to be "*maintained.*" This was in view of the provision of Sec. 11, "that said Northern Pacific Railroad shall be a post route and a military road, subject to the use of the United States." It was (6) to be "*enjoyed.*" This was in view of the provisions of Sec. 13, conferring authority "from time to time to fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property on said road or any part thereof; and the provisions of Sec. 17, "to hold and enjoy any grant, donation, power, franchise, aid or assistance to its own use for the purpose aforesaid."

With respect to the right of way granted by Sec. 2, there is no dispute that it was a grant *in praesenti* of a right of way to be located by the company through lands which were then public. Although the grant of lands in aid is contained in a separate section (Sec. 3), it is apparent that Congress did not consider the subjects to be distinct in their character, for, in the last paragraph of Sec. 2, it is provided that the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to *all lands falling under the operation of this act, and acquired in the donation to the road named in this bill.*" Thus, in Sec. 2, relating chiefly to right of way, which measured less than 50 acres per mile, provision is made for the land-grant, which measured the vastly greater quantity of 25,600 acres per mile, while in Sec. 3, which relates chiefly to the land-grant, reference is made to "the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." But in view of the plain meaning

of the words, the fact that this provision is found in Sec. 3, and not in Sec. 2, no more renders it inapplicable to the right of way than does the fact that the provision as to extinguishment of the Indian titles is found in Sec. 2, and not in Sec. 3, render that provision inapplicable to the land-grant. As counsel for the plaintiff in error well says, at page 8 of his brief, "the country through which the Northern Pacific was projected to run was public land *inhabited largely by unfriendly tribes of Indians.*" What good would it do to extinguish their title to a strip 400 feet wide, so long as they continued their hostile occupancy of vast areas on both sides?

Nor is the significance which counsel ascribes to the use, in Sec. 2, of the words "where it may pass through the public domain," justified, when, under the settled rule of construction, the context is considered, for, as is well stated in the opinion of the Circuit Court of Appeals:

> "It is said that the grant of right of way reads, 'said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain;' while the grant of lands in aid of the construction reads, 'to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land on each side of said railroad when it passes through any state.' And hence that the former grant refers to the constructed railroad, and the latter to the line of definite location on the map. But this argument is hypercritical. It proves too much. It proves that the land grant itself is to be measured from the line of definite location fixed on the map, in *territories*, and from the constructed railroad in *states;* for the grant is of twenty alternate sections 'on each side of said railroad line' in territories, and ten alternate sections 'on each side of said railroad' in states. The fact is that the words 'railroad' and 'railroad line,' are here used interchangeably as synonymous terms, and no special significance attached to the use of the one or the other."

The fourth section provides for the appointment of commissioners, to examine and report to the President. We have already seen that the duty of these commissioners was limited to ascertaining and reporting whether the road had been *constructed* and equipped in the manner and of the materials specified in Sec. 5.

That location and construction were not deemed identical is further to be inferred from the power given the board of directors in Sec. 15, "to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road."

Sec. 7 confers upon the Railroad Company the power to exercise the right of eminent domain to the fullest extent.

To the claim that construction and not the filing and acceptance of the map of definite location defined the limits of the right of way, we answer by asking, How much construction? The road on the line of definite location was partly constructed. The report of the commissioners (Trans. pp. 26 and 27) shows that the road on the new line was not finished at the date of that report. Besides, where, in the act, is found the provision to that effect? Is it construction, followed by operation, that is to govern? If so, for how long? In the language of counsel for plaintiffs in error (brief, p. 14), "it should be a matter of common knowledge of which this Court will take notice," and was a matter of which the Circuit Court of Appeals (*ante*, p. 21) did take notice that, after construction and operation, changes in location are frequent. Where is the statute or rule that is to fix the extent of operation?

Counsel says that "if the decision below is to stand, it affords

good ground for controversy between every land grant road and every land owner along its line as to the boundary between them. We assert the very opposite. As stated by the Circuit Court of Appeals (*ante*, p. 21):

> "It is said that the right of way granted by this act should be held to extend for two hundred feet on each side of the center line of the main track of the railroad as originally constructed. It is not claimed that this right of way has been swung to the north and to the south from time to time as the company has since changed its main track, as it must frequently have done, especially in large cities where it has many tracks. It is not claimed that the company has ever amended its map of definite location of its line to show where the line originally constructed was, or that there is any public record anywhere from which its location and the limits of this right can be learned. The only way these can be discovered now is from the testimony of the few witnesses who have knowledge of where the main track was laid twenty years ago, and the death of these witnesses will soon compel a resort to evidence still less reliable. Lots and lands in this country are bought and sold on the faith of the public records. If this right of way is not anchored to the line fixed by the map of this company, the record of that map must prove a constant snare to purchasers of lands near this railroad. It is no answer to this position to say that the railroad is visible on the land it traverses, because it is common knowledge that lands are frequently bought and sold without a view of the premises, and because no view of the premises now could determine where the main track was twenty years ago. We are unable to persuade ourselves that Congress ever intended to leave the location and limits of this right of way so indefinite and indefinable. * * * It is of paramount importance that there should be a public record accessible to all, from which the extent and limits of this right may be ascertained. It would be intolerable that so valuable a right should be disconnected, as defendant's counsel claim it is, from the line definitely fixed by the map of the company; should attach itself to the center line of the main track of the railroad as originally constructed twenty years ago, and should

> have no muniment of title but the uncertain memory of witnesses of its construction, to fix its limits."

Counsel asserts that the *land department* has not required maps of definite location to be sufficiently accurate so that it could also therefrom define the right of way. We answer that beyond all question, for whatever purpose, *the act* requires it and this Court will not assume that a co-ordinate branch of the government has violated the law, nor will plaintiff in error be heard to say that it has done so. Besides, even if the claim could be asserted, "*Id certum est quod certum reddi potest.*" From the testimony of Messrs. Morris and Meigs, offered by plaintiffs in error, it appears that this line of definite location, made in May, 1873, after the public surveys were completed, is *mathematically precise.*

(Tran. p. 41, Testimony of Mr. Meigs, who fixed the line):

Q. I will ask you to read the question and answer, in the testimony of C. A. F. Morris, in this case, as follows:

'Q. Now, describe the survey of definite location of the line, as contradistinguished from the construction survey.'

Please read the answer following this, and state whether that is a correct statement of what was done with respect to the definite location of the Northern Pacific Railroad, as testified to by you?

A. I think it is. Mr. Morris seems to have described very accurately, the usual processes in railway surveys for construction."

(Trans. p. 33, Testimony of Mr. Morris):

Q. Now describe the survey of definite location of the line as contradistinguished from the construction survey?

A. The country lying between the points designed to be connected with the line of railroad is first carefully examined by the engineer placed in charge of such survey. He takes

notes of leading points that he designs to run by in the general direction of the proposed line, taking care to avoid all natural obstructions that should necessitate large cost and trouble to the company proposing to build the line. He then commences with his parties to run out by course and distance and stake out on the ground a proposed line, carefully noting all changes of courses, and taking the levels of lines as he proceeds, in order to enable him to judge of the feasibility of the line he has previously staked out. If the line is satisfactory, he takes field notes showing the general topography of the country adjoining and ties up or connects his line with the U. S. government surveys, if they exist in the locality, so as to enable him to make an accurate map showing his location and the natural features of the country through which the route runs, his stakes being placed at intervals of one hundred feet.

Q. Such line becomes a line upon the ground, does it not?

A. It does.

Q. Was not the line of definite location marked upon Exhibit "B" established in the manner you have just described?

A. It was."

Moreover, so far as this case is concerned, it is sufficiently definite, for it shows the line to be at least two miles south of the premises in question. This map of "definite location" affords the means, and the only means, of preventing, instead of engendering, the disputes which counsel deprecates. More than twenty years have elapsed since the last of these grants was made; more than twenty-five years since the road was begun, and more than fourteen years since "the last spike was driven," and yet less than six cases can be found in the books.

If it was important to know how the grant affected lands forty miles distant from the railroad, was it not much more im-

portant to know how it affected lands directly contiguous ~~and~~ when passing through future populous towns and villages?

It is no hardship to require of this company what the statutes of every state in the Union require of every railroad company which acquired its right of way or any portion thereof by condemnation, and what this same company would be compelled to furnish, and frequently has been compelled to furnish where it has proceeded, under the provisions of section 7 of this very act, to acquire right of way by condemnation, and that is to file in some public office, accessible to all who may at any time be interested, an exact map or statement of the limits of its right of way. Such maps or descriptions are invariably required to be filed in advance of construction, and we have yet to hear that such requirement has ever worked a hardship.

Not only to illustrate this point, but to show the construction which this railroad company itself placed upon the act of July 2nd, 1864, the case of Northern Pacific Railroad Company v. Jackman (6 Dak. Reports, 236), is instructive. From this it appears that in January, 1881, the railroad company filed in the district court of Burleigh county, Dakota Territory, a petition for condemnation of part of section 32 (which is the section adjoining that here in question), for the purpose of a right of way. While the statement contained in the report does not show all the facts, the original record discloses that the company relied upon section 7; evidently and correctly, as we claim, assuming that its right under the original grant of right of way had been exhausted.

Afterwards, in 1889, it resisted the application of Jackman, who was a pre-emptor at the date of the condemnation proceedings but whose title had meanwhile been perfected by patent, for the condemnation money.

In its petition in that matter the company alleges as follows:

> "That in the construction and working of said road it will be necessary for the plaintiff to have a tract of land 100 feet in width on each side of the center line of its said road through the S. W. ¼ of section 32 aforesaid, described as follows, to-wit: All of a certain strip of land in said quarter section within one hundred feet of the located center line of said railroad, the said line entering the said quarter section at a point 271 feet west of the southeast corner thereof, and running with magnetic bearing north 73 degrees 45 minutes west to a point 1,496 feet north of the southwest corner of said quarter section, and containing twelve and eighty-four one-hundredths acres as appears from the map of said line hereto attached and made a part hereof."

Counsel for the railroad company there also cited the Baldwin case, but the court held that the company, having proceeded to condemn under the statute, could not be heard to contest the validity of the award.

It is not claimed that this case has any bearing upon that at bar, further than to illustrate the reasonableness of the doctrine for which we contend, and that it appeared so to the defendant in error, which, in 1881, invoked it in its own behalf.

If, as counsel appears to apprehend, any considerable difficulty is liable to follow a proper construction by this court of the statute in question, it could easily be remedied by the voluntary act of the company in filing in the registry office of each county a map of the definite location of its right of way through such county, drawn with such precision as the testimony of Messrs. Morris and Meigs shows is practicable, or by acts of the legislature requiring the filing of such maps.

> "It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls

so far as limits are concerned, as if such descriptive features were written out upon the face of the deed of the grant itself."

Cragin v. Powell, 128 U. S. 691.

The act in question is to be construed by giving effect to the plain and unambiguous words "*definite location*," and by considering all of its parts and provisions. Repeated decisions of this court have sanctioned the doctrine thus expressed by Sutherland on Statutory Construction, (Sec. 239):

"The intention is to be ascertained by considering the entire statute. The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of every part. This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general design. A statute should be so constructed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose. If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. It is said to be the most natural exposition of a statute to construe one part by another, for that expresses the meaning of the makers; this exposition is *ex visceribus actus*. The words and meaning of one part may lead to and furnish an explanation of the sense of another. 'To discover,' says Pollock, C. B., 'the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the *actual language* of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other claus-

> es, *may reasonably and obviously be drawn.* * * * If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If, after all, it turns out that that can not be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

Grants of this character, if the language be doubtful, are to be construed most strongly against the grantee. This rule was applied to this very charter in the recent case of Barden vs. N. P. R. R. Co., 154 U. S. 288, in which Mr. Justice Field, delivering the opinion of the court, said:

> "The language of the grant to the plaintiff is free from ambiguity. The exclusion from its operation of all mineral lands is entirely clear, and, *if there were any doubt respecting it,* the established rule of construction applicable to statutes making such grants would *compel a construction favorable to the grantor.* * * * The patent was in law a declaration that minerals did not exist in the premises when it was issued. * * * The *grant under consideration is one of a public nature. It* covers an immense domain, greater in extent than the area of some of our largest states, *and it must be strictly construed.* It would seem, from the frequency with which we have announced this doctrine, that it should be forever closed against further question. * * * In Leavenworth L. & G. R. Co. v. U. S., 92 U. S. 733, this court said: 'The rules which govern the interpretation of legislative grants * * * apply as well to grants of lands to states to aid in building railroads as to *grants of special privileges to private corporations.* In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object, the accomplishment of which it desires to promote, but declines to undertake. * * * If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings,—*one of extension, and one of limitation,—they must be accepted in a sense favorable to the grantor.*' "

> "In construing a public grant, as we have seen, the intention of the grantor, *gathered from the whole and every part of it*, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive the benefit of them."
>
> Leavenworth etc. R. R. Co. v. U. S. 92 U. S. 733, p. 746.

The propositions for which we contend, as we understand it, are established by the decision in the Cook case, and we have endeavored to show that there is no practical distinction to be made between them, but counsel now asks the court, even if it should so conclude, to overrule that case on the ground that it is in conflict with the case of R. R. Co. v. Baldwin, 103 U. S. 426.

We find no such inconsistency between the Cook case and the Baldwin case as counsel for plaintiff in error claims to exist.

Our proposition which, as we assert, is established by the decision in the Cook case, is that the defendant's charter contains two distinct grants, differing only in that one (that of lands in aid) contains exceptions or reservations as to the public lands which should fall under its operation *when the line was definitely located;* while the other (that of the right of way) is without exception or reservation as to the public lands which should fall under its operation *when the line was definitely located.*

The Baldwin case, and all other cases cited by counsel in support of his contention, establish, and do not controvert, that proposition. But he seeks to go further and deduce therefrom the doctrine that in respect of the right of way the grant is not only without exception or reservation as to the public lands which should fall under its operation *when the line was*

definitely located, but should continue without such exception or reservation after such definite location, and until the line is finally constructed and completed. We submit that neither the Baldwin case nor any other case to be found in the books supports that contention. In the Baldwin case both parties conceded and the entire decision goes upon the theory that the map of definite location gave precision to the right of way. The only question was as to *when* it took effect as to settlers, not *where*.

Moreover, the reasoning in the opinion in that case is entirely consistent with the decision in the Cook case. The land grant in the Baldwin case was of "ten sections in width on each side of said road." The court says (p. 429):

> "The sections could be ascertained only when the route was *definitely fixed*, (not 'when the road was *constructed*'). This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of *ascertaining the most favorable route*." (Not the difficulties experienced in constructing the road).

Again on page 430:

> "If the company could be compelled to purchase its way over any section that might be occupied in advance of its *location* (not 'final *construction*'), very serious obstacles, etc."

Again, on the same page:

> "We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed.'

And what was that construction? Why, that of that which was public land at the date of the grant every alternate section within 40 miles of the line, *as ascertained by the filing*

of the map of definite location, should pass to the company except those to which homestead pre-emption or other claims had then attached. So that, "giving to the words of present grant with respect to the right of way the same construction" would be to hold as the court did that of that which was public lands at the date of the grant, all within 200 feet on each side of the center line, as ascertained *by the filing of the map of definite location*, should pass to the company *without* exception.

The Cook case holds no more and we claim no more in this case.

Not only is the Cook case not in conflict with the Baldwin case but it is in harmony with all the prior decisions of this court, having a bearing upon the questions involved.

As to the effect of proceedings in the general land office, culminating in the issue of the patent to the grantor of defendant in error, the following decisions are pertinent:

> "The question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and pre-emption *depended upon matters disclosed by the record of proceedings in the land department*, namely, that the public surveys had been extended over the land, *and that other lands had been appropriated to the satisfaction of the grant.*"
>
> Quinby v. Conlan, 104 U. S. 420.

> "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the proceedings taken to obtain the title, from

their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law.

* * * * * * * * *

The general doctrine declared may be stated in a different form thus: A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in Minter v. Crommelin, reported in 18th Howard, where it appeared that an act of congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the land department unless specifically directed by the secretary

of the treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the secretary had ordered it to be sold, and the court said:

'The rule being that the patent is evidence that all previous steps have been regularly taken to justify making of the patent, and one of the necessary steps here being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of Bagnell v. Broderick (13 Pet. 436), and is not open to controversy anywhere, and the state court was mistaken in holding otheriwse.'

(Smelting Co. v. Kemp, 104 U. S. 636).

We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, *the acts he has performed to secure the title*, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy

of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It can not be vacated or limited in proceedings where it comes collaterally in question."

Steel v. Smelting Co., 106 U. S. 447.

In Sanford v. Sanford, 139 U. S. 642, the court say:

"In ejectment, the question always is who has the legal title to the demanded premises, not who ought to have it. In such cases the patent of the government, issued upon the direction of the land department, is unassailable."

"Conceding that that construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant, and determining what lands did and what did not pass."

U. S. v. Winona & St. P. R. Co., 165 U. S. 483.

In the case of Western Pacific Railroad Company v. Tevis, 41 Cal. 489, the court say:

"The right of way over the public lands of the United States became perfect upon the filing of the plat of the location of the railroad in the proper land office."

In addition to the case of Barden v. N. P. R. R. Co. (*supra*.) this charter has twice received construction in this court.

In Butts v. N. P. R. R. Co., 119 U. S. 55, the court say:

"The act of congress not only contemplates the filing by the company, in the office of the commissioner of the general land office, of a map showing the definite location of the line of its road * * * but it also contemplates a preliminary designation of the general route of the road, &c."

In St. Paul & P. R. R. Co. v. N. P. R. R. Co., 139 U. S. 1, after speaking of the map *of general* location the opinion proceeds:

> "The company then proceeded with the work of definitely locating the line of the road through that state, and on the 21st of November, 1871, filed in the office of the commissioner of the general land office a map or plat of the line thus definitely fixed, approved by the secretary of the interior. The company subsequently constructed and equipped the road through that state in all respects as a first-class railroad, and has since operated and maintained it. The road was accepted and approved by the president in accordance with the provisions of the fourth section of the act of July 2, 1864.
>
> "There was, therefore, no operative grant until there was an effective release, and, whichever date be taken—whether December 13th or 19th—it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. A map of that location, approved by the secretary of the interior, was filed, as stated above, in the office of the commissioner of the general land office on the 21st of the previous November. No grant, therefore, was in existence of any lands to any other company, which are claimed by the plaintiff in this suit, at the time of the definite location of its route."

The construction which this company itself placed upon the act is apparent not only from the Jackman case (*supra*), but from the case of N. P. R. R. Co. v. Meadows, 46 Fed. R. 254, where the plaintiff in error declared as follows:

> "That the date when said line was definitely fixed and the plat thereof filed was on the 6th day of July, 1882."

There is less room for claiming, as does counsel for plaintiffs in error, that the provisions for filing the map of definite location in the office of the commissioner of the general land office was inserted by congress without intention that it should affect the right of way, because of the fact that congress had long previously adopted that method of fixing rights of way

in acts which *contained no land grants*. On August 4th, 1852, (10 St. L., ch. 80) there was passed "An act to grant the right of way to all rail and plank roads and macadamized turnpikes passing through the public lands belonging to the United States." Section 3 of that act contained the following provision:

> "Provided further, that whenever the location for either of said railroads or plank roads, macadamized turnpikes or sites for depots on the line of such road or roads shall be selected, the proper officers of such road or roads shall transmit to the commissioner of the general land office a correct plat of the survey of said road or roads, together with the surveys of sites for depots, before such selection shall become operative."

In addition to what seems to us the unanswerable logic of the decision of the circuit court of appeals upon that point, we invite the attention of the court to the following pertinent language of the supreme court of Iowa, a state containing probably more miles of land-grant road than any other in the Union, and where the entire situation was clearly understood and declared. In the case of C. R. I. & P. R. Co. v. Grinnell, 51 Iowa, 476 (affirmed in Grinnell v. Railroad Co., 103 U. S. 739), Ch. J. Beck, delivering the opinion of the court, said:

> "When the statute was enacted the railroad had no existence. The object of the grant was to aid in the construction of a road in contemplation, to aid in creating such a railroad. It was well understood by congress that the building of railroads, like all other great enterprises, required forethought and preparation, by the adoption of plans as to the character and extent of the work, and the means for accomplishing it. Indeed, the act itself exhibits such forethought and preparation in designating the termini of the road, and in making the grant in order to provide means for the accomplishment of the enterprise. It was, therefore, well understood by congress that before the railroad would or could be constructed, a route must be surveyed and adopted. It

could not have been expected that so great a work would be prosecuted without fixed plans and designs as to the course and line of the road. Congress well knew that the line of the railroad would be surveyed and adopted by the state, or by the persons natural or artificial that should undertake to construct it. The survey of the route and the location of the line of the railroad, is a part of the work of construction. These are the beginning of the work, it is true, but are, nevertheless, a part of the work and a very important part. They demand great skill and wisdom, and very considerable outlay of money; of necessity, they are, as we have said, the first work to be done; when done, the route or line of the road is fixed—definitely fixed. The railroad has then assumed a form and an existence as an embryo, it is true, but, nevertheless, an existence of the character that is at the beginning of all things which do not spring up complete by the magic of a word or a single act. The line surveyed and adopted is just as definitely fixed, as permanently located, as it is after the road is built. In either case it may be changed by the exercise of the will of those having control of the road. In the exercise of that will the line of the road, when the survey is adopted, may be changed before the work is commenced; so it may be changed at any time afterward, even when the road is fully completed and in operation. The effect of a change in one case, is not different from a change in the other. In neither case would the fact of the change lead to the conclusion that the railroad had not been definitely located by the survey first adopted. It is true that it may not be said to be permanently located, for nothing that depends upon the changeable will of man is permanent. The plaintiff's railroad, today, cannot be said to be permanently, unchangeably located, except as to the points fixed by the statutes under which it received the grant of lands. If the interest of trade requires changes at particular points they may be made. The line of the road, today, however, is definitely fixed—unmistakably located; but no more definitely fixed than when the survey was first made and adopted."

We beg to suggest that even a strict construction of the

charter gave to the plaintiff in error the amplest opportunity to exercise its election after it had been fully informed as to the most feasible route in every particular, and to so designate its line of definite location as to best accomplish its purposes, and even after this was done a grant of 400 feet in width, nearly *forty* times the usual width of road bed, was ample for ordinary variations and the right of eminent domain was intended to apply to other cases.

Referring now to the cases cited by counsel for plaintiff in error, which have not already been discussed, we assert that none of them contains anything opposed to our position.

In the case of C. P. R. R. Co. v. Dyer, 1 Sawyer 643, the only question before the court and the only question decided was that acquisitions of the land over which the right of way was granted, made subsequent to the passage of the act, are subject to the exercise of the right; and that the *reservations* and *exceptions* found in the preceding section apply only to the grants of land therein mentioned, and not to the grant of the right of way; and that the map of *general route* does not affect the grant of the right of way.

The case of M. K. & T. Ry. Co. v. K. P. R. Co., 97 U. S. 491, embraced in the citation upon page 12 of counsel's brief, was not a right-of-way case. Moreover, the act there construed (12 St. L. 489 and known as the Union Pacific act) was radically different in respect of the matters here in controversy from the Northern Pacific act. Where, in the former, in section 3, the provision as to pre-emption and homestead exemptions out of lands granted reads, "may not have attached at the

time the line of said road is definitely fixed," the latter reads, "at the time the line of said road is definitely fixed *and a plat thereof filed in the office of the commissioner of the general land office.*" Besides, in the Union Pacific act, section 9 contained the following provision which affected the lands in question in that case:

> "The route in Kansas west of the meridian of Fort Riley to the aforesaid point on the 100th meridian of longitude, *to be subject to the approval of the president of the United States and to be determined by him on the actual survey.*"

When congress came to pass the Northern Pacific act it evidently occurred to them that it would be much more appropriate to provide for the selection of the line of definite location by the company, and the filing of a map of definite location in the office of the commissioner of the general land office, and they so provided.

We submit that this case supports, rather than opposes, our contention.

In the case of Leavenworth, etc., R. R. Co. v. U. S. 92 U. S. 733, which also was not a right-of-way case, and which company had by act of congress, (17 St. L. 5), "for the purpose of improving its route and accommodating the country," been authorized to "relocate any portion of its road south of the town of Thayer within the limits of its grant," the question was whether a recital in the act authorizing the relocation, to the effect that certain lands were within the limits of its grant, had the effect of extending the limits of such grant, and it was held that it did not. The case was cited by the court in the Baldwin case merely as holding that such grants are *in praesenti.*

Hamilton v. Spokane & P. Ry. Co., 2 Ida. 898, holds only that the grant of the right of way operated upon school sections reserved from prior pre-emption claim. There was no question of the location of the right of way, or abandonment, and the court says:

> "In the case at bar the grant took effect from the date of the approval of the plat, which was July 11, 1889."

In the case of Union Pacific Ry. Co. v. Douglas Co., 31 Fed. R. 540, the only question was whether the Union Pacific grant of right of way was operative upon sections 16 and 36, the sections granted for school purposes to the state of Nebraska; and the court held that it was ~~not~~, saying:

> "No provision is made for condemning the right of way over school sections, nor is it easily to be perceived how, under the statute then in force, proceedings could be had for such condemnation."

There was no question of location of the right-of-way involved.

The case of Bybee v. Oregon & C. Ry. Co., 26 Fed. R. 586, cited by counsel, has heretofore been cited by us as an authority to the contrary. In that case the court expressly held that the grant of the right of way was absolute, "to take effect on the definite location of the line of the road, from the passage of the act."

The case of Doran v. C. P. R. Co., 24 Cal. 246, does not affect the question of when the right of way attaches, but holds that the grant extends to and covers all public lands whether mineral or not. Moreover it is an authority in support of our proposition, hereinafter stated, upon the question of *res judicata*.

The case of Washington & I. R. Co. v. Couer d'Alene Ry. &

N. Co., 160 U. S. 77, cited by plaintiff in error, differed from the case at bar in the following particulars:

In the first place, the right of way in question in that action was claimed under the provisions of the act of March 3rd, 1875, "An act granting to railroads the right of way through the public lands of the United States." *There is no reference in the act to either a map of definite location or the filing thereof in the office of the land commissioner of the general land office for any purpose whatever.* The words "definite location" and "definitely located" are not found in the act. Section 4 thereof is as follows:

> "That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the *register of the land office for the district where such land is located, a profile of its road,* and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office; and *thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.*

The word "profile," while not aptly chosen, was evidently used to convey the idea that there should be delineated upon the plats required by law to be kept in the local land offices, an outline of the route of the railroads constructed under that act *sufficiently definite only to enable the local land officers to ascertain through what particular quarter sections or other subdivisions the proposed route was to run,* so that patents of such lands might issue "subject to such right of way," without attempting to exactly define the same. It no more resembles in its character or purpose the "map of definite location" which, under the Northern Pacific act, was

to be filed in the general land office, than the silhouette of our forefathers resembles the finished photograph of the present day. Moreover, in that case, it appears by the sixth finding of fact, "that at all the times above mentioned, the lands in controversy, and all other lands along the line of said railroad of the defendant, *were unsurveyed public lands of the United States*," It further appeared that the land in question was occupied by the railroad, side-tracks and depot of the defendant, and that neither the plaintiff nor any person for it ever made or did any act upon the premises or took any possession thereof. Consequently, the court well held that "Regarding this question as one entirely between the Couer d'Alene Railway and Navigation Company and the United States, it should be observed that the act of congress under which both parties claim the land in question, by its fourth section, provides that *in case of unsurveyed lands of the United States, as these were, the plat need not be filed until twelve months after the survey thereof*," and "that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened," and that "if the United States could not and do not complain there is no foundation for the plaintiff company to do so."

In *this case* the United States has acted by the issue of its patent.

The case of N. P. R. R. Co. v. Colburn, 164 U. S. 383, is cited upon page 17 of counsel's brief to the effect that "it is now settled that mere occupation without the filing of any claim in the land office does not attach any private rights to the land as against the United States." The decision merely held "that no *pre-emption* or *homestead* claim attaches to a grant until an entry in the local land office." But, as we have seen,

under sec. 2387 R. S., settlement upon land afterwar.'s entered as a townsite, gives rights which relate back to the date of the settlement.

FORMER ADJUDICATION.

We have seen that the Dakota Code, § 298 (*ante*, p. 8) required the judgment to *specify clearly* the relief granted.

As we have already stated, the *judgment* in the prior action was "that the plaintiff have judgment herein on the demurrer as frivolous, and that plaintiff recover *possession of the real estate* described as follows * * *; and also six cents damages for the withholding *possession* thereof." There was certainly no *express* adjudication of anything except right of possession. As we shall attempt to show, under an unbroken line of decisions of the supreme court of California, from which state the Code of Dakota was copied *verbatim*, rendered before such adoption, this judgment could have been rendered upon proof of any facts showing right of possession as against the defendant at the commencement of the action. Therefore the judgment established that right and nothing more. But, while insisting upon that proposition, which we claim the authorities hereinafter cited support, we will for convenience consider in the same connection, the effect of that judgment upon the theory that resort is to be had to the complaint. It was there alleged: 1. That plaintiff was a corporation created by the Act of Congress of July 2, 1864. 2. That defendants Brown and Wringose were and had been for three years last copartners. 3. "That in May, 1873, plaintiff became *seized* in fee for the use and purpose of a right of way to the following described real estate, viz., that certain tract of land 200 feet in width and 300 feet in length, lying between

Third and Fourth streets and north and along the railroad track in the city of Bismarck." 4. "That Browning & Wringrose, one of the defendants above named, on or about the 1st day of October, 1874, *wrongfully and unlawfully went into possession* of that part of said tract of land described as follows * * * 5. That on or about the 1st day of November, 1876, the said Browning & Wringrose rented said premises to P. R. Smith, who is now in the possession thereof. 6. That defendant *wrongfully and unlawfully* withholds the possession thereof from plaintiff. The prayer is for "judgment for the possession of said premises and for $500 damages, the plaintiff's damages by withholding of the same."

Where is the allegation that the United States in May, 1873, or at any other time, granted the premises to the plaintiff for a right of way or for any other purpose? There were at least two other ways in which plaintiff could have become "seized in fee for the use and purpose of a right of way," whatever that means. 1. As the land had been surveyed in 1872, (Trans., p. 16) it could have been conveyed to plaintiff, or 2. It could have acquired it under Sec. 7 of its charter, as it afterwards did the Jackman land in the adjoining section (See N. P. R. R. Co. v. Jackman, *supra*). In the next place, as we shall try to show, all of that complaint after the *first* allegation was immaterial and not well pleaded (and nothing of that character is admitted by a demurrer) except that plaintiff in May, 1873, became seized of the premises, that defendants wrongfully and unlawfully entered and wrongfully and unlawfully withheld possession. Those allegations, we submit, would have supported the judgment and it establishes no others, even *inferentially*. How, or for what purpose, plaintiff became seized was immaterial. The question was, *was it seized?*" And this "*seizin*," under the law of Dakota, as it then existed, was "*possession*,"

and nothing else, as we think the authorities establish. Plaintiff did not ask, nor did the judgment purport to grant any relief except "*possession.*"

The demurrer in the former action did not admit the recitals of the complaint.

> "The averments of the bill as to the purport and meaning of the provisions of the indenture, the object of their insertion in the instrument, and the obligations they imposed upon the corporation and the trustees, and the *rights they conferred upon the plaintiff* when his contract was approved, are not admitted by the demurrer. These are matters of legal inference, conclusions of law upon the construction of the indenture, and are open to contention, a copy of the instrument itself being annexed to the bill, and therefore, before the court for inspection. A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated."
>
> Dillon v. Barnard, 21 Wall. 430.

The allegation in the complaint in the former action that plaintiff became "seized" of the premises, was equivalent to an allegation of actual possession.

> "As a general proposition, by the law in this country, the making, delivering and recording of a deed of land passes the seizin thereof without any formal entry being necessary. This is generally by force of the statutes of the several states; in some, such a deed being in terms declared to be equivalent to livery of seizin, *and in others dispensing with any further act to pass a full and complete title.*"
>
> 1 Wash. R. Prop.* 38.

The latter is now the case in Dakota, but the act was not passed until 1877, while this seizin is alleged to have occurred in May, 1873.

Bouvier defines seizin as "possession with an intent on the part of him who holds it to claim a freehold estate." To the same effect is 1 Wash. R. Prop. 35.

> "Seizin, as now understood, is either *in fact* or *in law*. To constitute a seizin in fact, there must be an actual possession of the land. Seizin in fact necessarily implies possession, there being 'no legal difference between the words seizin and possession,' if the possession be with an intent on the part of him who holds it to claim a freehold interest. Seizin in law occurs where an ancestor or devisor dies leaving his lands vacant, the heir in the one case and the devisee in the other are deemed, by the law, to have a seizin which may at any time be converted into a seizin in fact."
>
> See also 3 Id., pp. 485, 487 and 493.

> "*Seizin*. A possession of real property founded on title. Enjoyment *or occupancy*, assumed in virtue of a right."
>
> Abbott's Law Dict.

> "*Seizin*. Possession, with intent on the part of him who holds it to claim a free hold interest."
>
> Black's Law Dict.

> "*Seizin*. The possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. *Ordinarily*, a possession *in fact* by one having or claiming a freehold interest."
>
> Anderson's Law Dict.

This was practically held in Massachusetts as early as the case of Marston v. Hobbs, 2 Mass. 437, affirmed in Bigelow v. Paige, 2 Mass. 455; Bearce v. Jackson, 4 Mass. 408, Slater v. Rawson, 6 Met. 444, and Raymond v. Raymond, 10 Cush. 134,—where the court say:

> "These covenants do not express or imply a warranty

> of any absolute title; they relate to the *actual* seizin of the grantor and that he has such *possession* of the premises as that he may execute a deed thereof. This covenant of a right to convey is synonymous with the covenant of seizin. The actual seizin of the grantor will support both of these covenants, irrespective of his having a good indefeasible title."
>
> "A seizin once had is presumed to continue."
>
> 3 Wash. R. Prop. * p. 493.

But, whether the allegation is to be treated as alleging merely possession or not, *proof of plaintiff's prior possession and defendant's trespass would have supported the judgment*, under the Code of Dakota, § 581 (*ante*, p. 8) and particularly under the authoritative decisions of California, there having been none in Dakota, and this proposition is also supported by decisions of this and other courts.

The code of Dakota was copied *verbatim* from that of California. Referring to the California code this court said:

> "The ruling was in conformity with the settled law of the state. Under the allegation of seizin in the complaint, it was sufficient, as determined by repeated adjudications of the Supreme Court of the state, for the plaintiff to establish any interest in the premises which gave him a right of possession. The action of ejectment determines no rights but those of present possession."
>
> Hardy v. Johnson, 1 Wall. 371.
>
> "Possession is always *prima facie* evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. The allegation that the plaintiff was in possession at the time of the ouster complained of, is a sufficient allegation of title to make the declaration good."
>
> Hutchinson v. Perley, 4 Cal. 33.
>
> Hicks et al. v. Davis et al., 4 Cal. 67; same point.

"Where the plaintiff in ejectment pleads a fee simple title, he is not compelled to prove the same, but can rely upon prior possession. The defendant, when a mere naked trespasser, cannot introduce evidence to show that the title is in a third party, or that the fee of the land in question is in the government of the United States."

Winans v. Christy, 4 Cal. 70.

"Possession of real estate is *prima facie* evidence of title, and sufficient to maintain ejectment."

Plume v. Seward, 4 Cal. 94.

McMinn v. Mayes, 4 Cal. 209.

"We have often held that possession is evidence of title, but it is equally true that possession gives a right of action against a mere trespasser, even where the title may be shown to exist in another."

Bequette v. Caulfield, 4 Cal. 278.

"Possession is evidence of title, and the party in possession is therefore deemed in law to be the owner, as against all others not having a superior title."

Bird v. Lisbros, 9 Cal. 1.

"It is the settled doctrine of the law, repeatedly affirmed by this court, that prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action."

Nagle v. Macy, 9 Cal. 426; citing the foregoing cases.

In Coryell v. Cain, 16 Cal. 567, Mr. Chief Justice Field, delivering the opinion of the court, said:

"It is undoubtedly true as a general rule that the claimant in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's; and that it is a sufficient answer to his action to show title out of him and in a third party. But this rule has in this state, from the anomalous condition of things, arising from the peculiar character of

the mining and landed interests of the country, been to a certain extent qualified and limited. The larger portion of the mining lands within the state belong to the United States, and yet that fact has never been considered as a sufficient answer to the prosecution of actions for the recovery of portions of such lands.

"Actions for the possession of mining claims, water privileges, and the like, situated upon the public lands, are matters of daily occurrence, and if proof of the paramount title of the government would operate to defeat them, confusion and ruin would be the result. In determining controversies between parties thus situated, the court proceeds upon the presumption of a grant from the government to the first appropriator; *and with the public lands which are not mineral lands*, the title, as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor and to proceed from him."

In Hubbard v. Barry, 21 Cal. 221, Mr. Chief Justice Field, delivering the opinion of the court, quotes the last above case, and adds:

"A similar rule is followed by us, though not founded upon a like presumption, in controversies for the possession of lands, where the real title is not in the government but is in an individual with whom, or in a corporation with which, neither of the parties connects himself. The owner of the true title not objecting or consenting to the possession of either of the parties, the court regards the better title, as between the parties, to be vested in the first possessor and grantees claiming through him. The rule rests upon its necessity for the preservation of peace and quiet in a country where titles to tracts of land, measured by leagues, are under consideration by the tribunals of the United States, and there is an indisposition in numerous instances on the part of claimants to assert their legal rights against the occupants until the final action of those tribunals."

In Southern Pacific R. R. Co. v. Orton, 6 Sawyer 157, the court held that *the line designated by a plat filed in the office*

of the commissioner of the general land office was the one contemplated by the act of congress; and that as it was competent for the corporation to take and hold land for some purposes, the settled rule in cases like that was that strangers could not litigate the question,—that it was a matter between the state and the corporation. Citing Matomah Co. v. Clarkin, 14 Ill. 542.

Mr. Justice Field, speaking for the court, said:

> "Whether or not the premises in controversy are necessary for the purposes of the corporation, is a matter between the government and the corporation, and is no concern of the defendants."
>
> "According to the settled principles of the common law, this is not a defence to the action. The plaintiff says he was seized in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title, it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder can not enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is till practiced, * * * or by an ejectment, * * * or he may maintain trespass. * * *
>
> Christy v. Scott, 14 How. 282," (quoted and approved in Sabariego v. Maverick, 124 U. S. 261).

In Hussey v. Smith, 99 U. S. 22, Mr. Justice Swayne, delivering the opinion of the court, said:

> "There can be no question that under the act of congress of March 2, 1867, (14 Stat. 541) Smith had an equit-

able interest in the premises in controversy which he could sell and convey."

(If he could convey he could recover for an invasion of it.)

"This principle is so well settled in the law of ejectment and trespass *quare clausum fregit*, as to need no citation of authority. It will be found laid down by Mr. Greenleaf in 2 Greenl. Evid., sect. 311, that either actual possession of the premises or receipt of rent is *prima facie* evidence of title in fee; also sect. 618, 618a. See also Hutchinson v. Perley, 4 Cal. 33; Nagle v. Macy, 9 Id. 426."

Burt v. Panjaud, 99 U. S. 180.

In Stringfellow v. Cain, 99 U. S. 615, the court say:

"In Hussey v. Smith (*supra*) we held that a non-resident might, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust. The power of an occupant to sell and convey his *possessory rights* is clearly recognized by the territorial statute."

"In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and, as against a mere trespasser it is sufficient. 2 Greenl. Evid. sect. 311."

Campbell v. Rankin, 99 U. S. 261.

"The plaintiffs and their predecessors in interest had made valuable improvements upon the lots, to which they *held a possessory right* at the time of the entry of the town-site."

Ashby v. Hall, 119 U. S. 527.

In Haws v. Victoria Copper Mining Co., 160 U. S. 303, the court say:

"The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary, but this principle is subject to the qualification that *possession alone is adequate as*

against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious, conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser can not make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed."

(Here the court gave the foregoing quotations from Christy v. Scott, 14 How. 282, 292, and Burt v. Panjaud, 99 U. S. 180:)

"As against a naked trespasser having neither claim nor color of title, proof of prior undisturbed possession is sufficient. Nor can a trespasser show an outstanding title in a third person. The principles of the action remain essentially unchanged; in fact, it is still one to recover the possession of land, in which the plaintiff must show a present legal right of possession, though in fact it is an action for determination of title. As the action retains many of its ancient characteristics it is important to remember that in its early form the question of title to land came before the court incidentally and collaterally, the trespass and ouster being the main issue.

Sedgwick and Wait Tr. Tit. to Land, sec. 58.

"But, although the general rule in actions of ejectment is, that the claimant must recover upon the strength of his own title, as above stated, this general principle has been so far modified, that, when the owner of the true title neither objects or consents to the possession of either party, the court regards the better right, as between the parties, to be vested in the first possessor, and grantees claiming through him. And when no legal title is shown, the party showing the prior possession will be held to have the better right. A *prior possession* is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrong doer, or a person subsequently entering with-

out lawful right, if the action to regain the prior possession be brought within a reasonable time."

Tyler on Ejectment, p. 72.

"*Issues concluded by judgment in ejectment.* Under the code a judgment in ejectment in conclusive of but two points,—the right of possession in plaintiff at the commencement of the suit, and the occupation of the premises by the defendant at the same date. At common law the judgment was, in an action for mesne profits, conclusive of the title at the time of the alleged demise. Under our practice the rule is different, because the plaintiff is entitled to recover upon proof of right to the possession at the commencement of his suit; and an allegation, on his part, in relation to the date of the acquisition of his title is immaterial."

Freeman on Judgments, Sec. 301.

"As against a mere trespasser, a bare peaceable possession by an actual occupant under claim of ownership, is ordinarily sufficient to authorize recovery; and such trespasser can not defend successfully by showing an outstanding title with which he in no way connects himself."

Wilson v. Glenn, 68 Ala. 383.

"A person who has lawful possession of lands may maintain an action for trespass committed upon them, and in his declaration need not set out more than his possessory title; *but if it goes further and alleges that he was well seized and possessed of those lands, and has a good, indefeasible estate in fee simple, and on the trial fails to establish such title, still he may recover upon proof of a lawful possession* during the period in which the injury complained of was committed; and if the case were tried upon the general issue, the record of it in a subsequent case between the same parties would prove nothing more than the plaintiff was bound to prove to entitle him to the verdict which he obtained."

Barker v. Hotchkiss, 25 Conn. 320.

"Such a judgment is *res judicata* as between the parties, that plaintiff's possession before the trespass in

that suit complained of, was peaceable and prior to defendant's, and of such a character to entitle the plaintiff to retake it if it could be done peaceably."

Ill. & St. Louis R. R. & Coal Co. v. Cobb, 82 Ill. 183.

"One who is in peaceable possession of land may rely upon such possession in an action against a trespasser."

Bertram v. Cook, 44 Mich. 396.

"A judgment in such an action is not conclusive upon the title, because the right of possession only, and not the title, is involved in an action of trespass. It is not conclusive upon the right of possession even at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or right which the defendant had at the time of the former trial. Such intervening events affecting the issue may be shown to prevent a former judgment from being conclusive, even where the *title* has been tried in a writ of entry."

Morse v. Marshall, 97 Mass. 519.

"There may be a possessory title, the holder of which may be treated by the true owner as a tort feasor, but which will avail such holder in maintaining an action of trespass or a writ of entry against a stranger for a disturbance of his possession. Nor in such an action could the defendant be permitted to show that the plaintiff's or defendant's possession was not that of the true owner, as there may be a possession perfectly legal and valid against one and yet wholly insufficient as against another."

Perry v. Weeks, 137 Mass. 584.

"A prior possession is sufficient to entitle the plaintiff in ejectment to recover against a mere intruder. We do not see why an outstanding title in the commonwealth furnishes a tenant a right to deny his landlord's right of possession, or *justifies an intruder in entering upon the peaceable possession of another.*"

Kline v. Johnston, 24 Pa. St. 72.

"The first count in the declaration states that the plaintiff was *seized and possessed* of a certain piece of land, with the appurtenances and easements thereunto belonging," etc., "and, by reason thereof, was entitled to the way. Now, the plaintiff was not seized in the strict land sense of that word; he had only a *possession* in right of his wife. According to the authorities it was not necessary for the plaintiff to have alleged a seizin in the land—possession alone, if rightful, was sufficient to maintain the action. The objection is, that, having so stated his title, he was bound to prove it. This, in general, is true, but in actions for torts the same strict rule of proof is not required as on contracts. This mode of stating the plaintiff's title is usual in actions of trespass; and I have never known the objection to prevail, that he did not prove *both* seizin and possession."

Pearce v. McClenaghan, 5 Rich. (S. C.) 178.

But even if title were in issue and determined in the former action, it was not the title here in question. To be effectual as a bar the *precise* question *must* have been adjudicated.

"It is not true that a court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the *same questions exactly*.'

Buck v. Colbath, 3 Wall. 334.

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necesarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been ren-

dered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, *even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.*"

Packet Co. v. Sickles, 5 Wall. 580.

Now, what was *necessarily tried and determined* in that former judgment? Certainly no more than that the plaintiff was at the time of the comencement of the action entitled to the possession of the property described therein as against the defendant Smith, a trespasser. According to the above decision, even if the attempted allegation of a right of way in the plaintiff was properly within the issue controverted therein, how can it be "shown that the judgment necessarily involved its consideration and determination"?

"But, when the pendency of such suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. *This relief must be founded on the same facts*, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties. In the case of Barrows v. Kindred, which was an action of ejectment, the plaintiff showed a good title to the land, and the defendant relied on a former judgment in his favor, between the same parties for the same land; the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this court held that as in the second suit the plain-

tiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit."

Watson v. Jones, 13 Wall. 679.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually* litigated and determined in the original action, not what *might have been* thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Cromwell v. County of Sac, 94 U. S. 351.

(In this opinion the cases of Outram v. Morewood, Gardner v. Bugbee, and Packet Co. v. Sickles, cited by counsel for plaintiff in error, were fully discussed.) The opinion proceeds:

"The case of Howlett v. Tarte, 10 C. B. n. s. 813, supports this view. That was an action for rent, under a building agreement. The defendant pleaded a subsequent agreement, changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer, the replication, after full argument, was held bad. In deciding the case, Mr. Justice Willes said: 'It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up

a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. * * * I think we should do wrong to favor the introduction of this new device into the law.' Mr. Justice Byles said: 'It is plain that there is no authority for saying that the defendant is precluded from setting up this defence.' Mr. Justice Keating said: 'This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant.'"

Id. p. 357.

In Britton v. Thornton, 112 U. S. 526, which came from Pennsylvania, the court say:

"But, in Mercer v. Watson, the court, after full consideration of the terms of the statute and of the reasons for its passage, concluded that "the legislature did not intend to bar the party from bringing a new action of ejectment for the same land, upon the same title, *until after two decisions should be had against him upon a full view and consideration of the whole of his case, and all the circumstances connected with it which he might think material.* In Treaster v. Fleischer, 7 W. & S. 137, it was adjudged that, although the statute did not expressly say so, the former verdicts and judgments must have been on the same title; because, in the words of Chief Justice Gibson, *'it certainly could not have been intended that a title should be barred by adjudication without having been adjudicated.'*

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, *either* upon the face of the record or be shown by extrinsic evidence, that the *precise question* was raised and determined in the former suit. If there be any uncertainty on this head in the record * * * the whole subject matter of the action will be at large, and open to a new contention, un-

less this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.

* * * * * * * * *

"According to Coke, an estoppel must 'be certain to every intent;' and if upon the face of a record anything is left to conjecture as to what was *necessarily involved and decided*, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. See Aiken v. Peck, 22 Vt. 260, and Hooker v. Hubbard, 102 Mass. 245."

Russell v. Place, 94 U. S. 606. (Reaffirmed in De Sollar v. Hanscome, 158 U. S. 216).

"This suit was brought upon a different cause of action from that upon which the former suit was brought. Whether the same issues were raised and *passed upon* in that suit which are raised in this, the stipulation does not inform us. The question is too general in its terms to admit of a *precise answer*. If the defendant sought to set up in this suit some *new defence, which was not made in the former one, and not necessarily decided therein*, it should have been allowed to do so, under the ruling of this court in Cromwell v. Sac County, 94 U. S. 351, 354."

Enfield v. Jordan, 119 U. S. 680.

"The recitals cut off the defense pleaded of original invalidity.. In this action notice is proved, and *an additional fact is put into the case, which makes a new question.* The effect of recital is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. *Surely an adjudication as to the effect of one fact alone does not preclude in the second suit, an inquiry and determination as to the effect of that fact in conjunction with others.* Infancy is pleaded in an action on a contract, and an adjudication is made establishing it as a defense. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove ratification after majority? Many reasons may induce or prevent the in-

troduction into the first case of all the facts. It was well said in Cromwell v. County of Sac, page 356, that:

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, *other demands arising out of the same transaction.*"

"This case may be looked at in another light. The defense pleaded in the Des Moines suit was that at the time of the issue of the two bonds then disclosed, there was a prior indebtedness of the district exceeding the constitutional limitation, and that defense was the one adjudged to be precluded by the recitals. Here an additional defense is that the five bonds in suit themselves created an over issue. *That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case.* It is of itself a valid defense, irrespective of prior indebtedness. So we have in this case a new question not presented in the Des Moines suit; the existence of facts never called to the attention of the court in that case, which of themselves create a perfect defense."

Nesbitt v. Independent Dist. of Riverside, 144 U. S. 610.

"As we have seen, the state supreme court did not seem to have before it the question *whether the transaction was not really a sale, and not a donation.* * * * Nor, as we have further seen, do the character and functions of the Northern Pacific Railroad Company as a *national highway and instrument of interstate commerce* appear to have been considered."

Roberts v. Northern Pac. R. R. Co., 158 U. S. 1.

"But in a subsequent action involving a different sub-

ject-matter, the former adjudication can not be relied upon, unless it appears not only that the issue now presented was presented, and ought to have been litigated in the prior action; but, further, that it was litigated and decided, as well as involved."

Freeman on Judgments, Sec. 253.

"No record is conclusive as to the truth of any imaterial allegations contained in the pleadings."

"And this rule will hold good in relation to all facts stated in the pleadings of either party, whether denied or admitted by his adversary, if the existence or nonexistence of those facts could have no effect upon the final determination of the rights of the parties."

Id. Sec. 271.

"A former judgment or decree between the same parties is conclusive evidence only of the facts which were in issue and decided, and not of facts which were assumed or admitted for the purposes of the former suit."

Black on Judgments, Sec. 622.

"A verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered."

Herman on Estoppel and Res Judicata, Sec. 254.

In Laird v. City of De Soto, 32 Fed. R. 652, which was an action upon municipal bonds, some of the same series of which had previously been the subject of litigation, Mr. Justice Brewer, then upon the circuit, said:

"This suit is not upon the same causes of action as the prior suits, and the rule of estoppel in respect thereto has been finally and definitely settled by the supreme court in at least three cases. Cromwell v. Sac County; Russell v. Place; Enfield v. Jordon. That rule is this: that where the second suit is not upon the same

causes of action, though between the same parties, the former judgment is conclusive as to matters *which were in fact and necessarily decided*, and is not conclusive as to matters which might have been, but which were not, presented and decided. It is further held that we must look to the record of the former cause to see if that shows what was certainly decided."

"It need hardly be remarked that the effect of verdicts, whether upon parties or privies, altogether depends on the question whether the same point was in issue. A verdict between two parties upon one question can, of course, have no binding effect in an issue joined between them on another. Nor will the verdict be admissible, unless it appears clear that the same point actually was in issue. It is not sufficient that it might have been so. See the expressions of Lord Ellenborough in Outram v. Morewood, *ubi supra*, where, speaking of the verdict in Evelyn v. Harries, his lordship says that 'it could not have been pleaded by way of estoppel, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel in the second action."

Duchess of Kingston's Case; 3 Smith's L. C., 9th Am. Ed. p. 2020.

Whaley v. Stevens, 24 S. C. 479, was a case where the former action was brought for obstruction of a right of way in gross. The second action was brought for the obstruction of the same right of way, but as appendant or appurtenant to a certain plantation. The court held that the causes of action were different, and that the former judgment could not be used in bar in the second action.

"The rule is well settled that nothing can be pleaded by way of estoppel, or relied on as conclusive evidence against a party, except it was directly in issue and found by the former verdict."

Gilbert v. Thompson, 9 Cush. 348.

"A judgment is conclusive by way of estoppel only as to facts, without the existence and proof or admission of which it *could not have been rendered.*"

Leonard v. Whitney, 109 Mass. 265.

"To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. *It must also appear to have been precisely determined.*"

Foster v. Busteed, 100 Mass. 409.

"A former adjudication of the right of action, where the court had jurisdiction of the subject matter and of the parties, is unquestionably a bar to an action for the same debt or claim, and is conclusive where the same subject matter is sought to be again litigated, no matter how, between the parties. In such case it is no answer to say, 'There were questions which were not raised or litigated.' It is enough if they might have been raised and litigated. But it is a different matter when an action is sought to be maintained or defeated *by showing a former adjudication of questions upon which it depends. In such case it must appear that such questions were litigated as a matter of fact;* that they were *submitted to and decided* by the jury or court; and that they were not collateral inquiries, but were crucial questions in the other controversy. The question becomes one of law if the record contains the conclusive evidence of it."

Bond v. Markstrum, 102 Mich. 11.

"The conclusive character of a judgment extends only to identical issues, and they must be such, not merely in name but in fact and substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not, if it is intrinsically and substantially an entirely different issue, *even though capable of being described in similar language, or by a com-*

mon form of expression, then the truth is not excluded, and the judgment is no answer to the different issue."

Palmer v. Hussey, 87 N. Y. 303.

"*Facts in controversy* on the trial of an issue but *not necessarily involved in issue*, though ever so important to its determination, are not settled by a judgment on the issue; but are open to controversy in any other suit between the same parties and their privies."

Doonan v. Glynn, 28 W. Va. 715.

The recent case of Richaud v. Tysen, 78 Fed. R. 561, is instructive. There it appears that in a former action in North Carolina the predecessor of the plaintiffs, as receiver of a national bank, had sued the same defendant and others, as heirs of one James Dawson, for liability upon stock; and the report of the former case in 70 Fed. R. 424 shows that it appeared from the evidence that one Field, as executor of Dawson's wife, was the owner of the stock; and thereupon the court dismissed the action. But the court, Shipman, C. J., says:

"The decree in the North Carolina case does not show that the court *necessarily and directly* found that at the date of the failure of the bank Field owned the stock."

and notwithstanding the recitals of evidence in the statement of the case, in the former action, and in the opinions both of the circuit court of appeals to that effect, refused to treat the former judgment as a bar.

In the 8th circuit Mr. Justice Miller, in the case of Keator v. St. John, 42 Fed R. 585, discussed this question. That was an action brought to charge the defendant for $18,000 money fraudulently received by him from a purchaser while he was acting as agent of the vendor. The defendant pleaded in bar a former judgment rendered in an action brought for the same purpose. Mr. Justice Miller said:

"It is very true there is a liberal statement in the first action against Mr. St. John, about his committing fraud on the plaintiff, and about the fraud concerning the purchase of this same land; and it is barely possible that under the first declaration the present fraud of the defendant having received $18,000 from the other side while acting as the agent of the plaintiff, might have been presented and considered. But it does not appear that it was proved. * * * The doctrine on that subject has undergone some modification, and has always been liable to some divergence of opinion in different courts at different times. Perhaps the doctrine as now established and as now acted upon by the supreme court of the United States is best stated in the case of Cromwell v. Sac Co., 94 U. S. 351, which was cited here the other day. It had been held in the case of Aurora v. West, 7 Wall. 82, that not only would what was actually decided in the first suit be a bar to a second suit for the same cause of action, but that whatever might have been decided under that issue was a bar to any further prosecution for the same cause of action. In Cromwell v. Sac. Co., it was held that the rule in Aurora v. West was a dictum not necessary to the case; that to be a bar to a subsequent suit the matter must either have been actually tried and decided, or it must have been inferentially decided; that is, it must be proven as an actual fact that it was submitted to the first court or jury, or it must be an inference from the state of the pleadings that the judgment rendered must have been considered in the trial court. I think that is the solid foundation on which the doctrine of *res judicata* rests."

Counsel for plaintiff in error says, upon page 20 of his brief, —"The estoppel of a judgment, while not extending to points not in issue, does cover every point which is in issue." This is hardly supported by the foregoing authorities and seems to be in conflict with the language of this court in Cromwell v. Sac. Co., as follows (94 U. S., p. 356):

"A judgment by default admits, for the purposes of

the action, the legality of the demand or claim in the suit; *it does not make the allegations of the declaration or complaint evidence in an action upon a different claim.*"

AFTER-ACQUIRED TITLE.

The judgment in the former action could not have the effect to bar the after-acquired title of defendant in error.

"But this (former adjudication against him in ejectment) did not deprive Barrows of the right to acquire a new and distinct title; and, having done so, he had the same right to assert it, without prejudice from the former suit, which would have accompanied the title into the hands of a stranger. At the termination of that suit the executors had not passed the title to any one. They did not transfer it for more than a year afterwards. How, then, can it be said to have been involved or in any wise affected by the prior litigation? The plaintiff could no more be barred than any other person who might have subsequently acquired the title."

Barrows v. Kindred, 4 Wall. 399.

As already stated, the Dakota code in force when the former action was prosecuted was copied *verbatim* from that of California. In an action arising under the latter, this court has said:

"In California a judgment in ejectment has the same conclusiveness as a judgment in any common law action, and in determining its effect the same principles are applied which control the result of the like inquiry in other cases. A defeated plaintiff may bring a new action upon an after-acquired title with the same effect as a stranger in whom such title might have been vested, and the former judgment will no more bar one than the other."

Merryman v. Bourne, 9 Wall. 592.

"In regard to the effect of a judgment in ejectment, it

may be remembered that it is not a bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as they were in the first suit. There is no evidence here that the same titles and defenses were set up in the former suit as were relied on in this."

Foster v. Evans, 51 Missouri 39.

If the Dakota action could be construed as having the effect claimed for it by counsel for plaintiff in error, it would contravene the organic act and the policy which this court has ever sustained.

"With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall also not interfere 'with any regulation that congress may find necessary for securing the title in such soil to the bona fide purchasers.'

"The same principle which forbids any state legislation interfering with the power of congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when

transferred, goes the right to possess and enjoy the land, and it *would amount to a denial of the power of disposal in congress if these benefits, which should follow upon the acquisition of the title, could be forfeited because they were not asserted before that title was issued.*

"But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted."

Gibson v. Choteau, 13 Wall. 92.

"A party may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first."

Vance v. Olinger, 27 Cal. 358.

The earliest case in California is that of Yount v. Howell, 14 Cal. 465, decided in 1859. The opinion, which was delivered by Chief Justice Field, discusses the subject as follows:

"The rule of the common law in relation to the proof of a legal estate and the right of entry at the date of the demise laid in the declaration, has no application under our system. The action of ejectment, at common law, proceeded upon a fictitious demise; and hence it became necessary to show title in the lessor of the plaintiff at the date of the alleged demise. In our system the fiction has no existence. In our practice it is sufficient if it appear that the plaintiff was entitled to the possession of the premises at the commencement of the action, and the date of the alleged sezin or possession and ouster become material only when the question of mesne profits is involved. These profits can be recover-

ed in the action of ejectment, and when claimed in that action, the proof must be limited to such as accrued subsequent to the ouster alleged—or, in other words, the occupation of the defendant. When they are claimed in an independent suit, the record of recovery in the ejectment is, as to the title, only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had. The rule is otherwise at the common law. The necessity of proof of title at the date of the alleged demise rendered the judgment conclusive of such title. This proof not being required in our practice, a corresponding change in the conclusiveness of the judgment follows. With us the judgment is only conclusive of two points: the right of possession in the plaintiff, and the occupation of the defendant at the institution of the suit."

In Mann v. Rogers, 35 Cal. 316, it appeared that in July, 1864, the defendant Rogers instituted an action of ejectment against the plaintiff Mann, to recover possession of the land in question, and in February, 1865, Rogers recovered a judgment in said action for the possession of the land sued for, and the next month Rogers was placed in possession and Mann evicted. In the second action the plaintiff declared against Rogers to recover possession of the land. The answer set up in bar the recovery against the plaintiff, as defendant, in the former action of ejectment.

It appeared that the land in question was a portion of a larger tract granted by the Mexican government to one Vallejo, which grant had been finally confirmed, but there had been no final survey or patent under the decree of confirmation; that on the 13th of October, 1865, subsequent to the judgment in the former action and prior to the commencement of the latter action, the plaintiff in the latter action (defendant in former) by proper mesne conveyances had acquired Vallejo's title to the land in contest. The court say:

"The defendants insist that the former recovery in ejectment is a bar to this action. But this proposition is not maintainable. The title to the land, when that action was pending, was in Vallejo or his grantee Steinbach, and not in the plaintiff. The judgment in ejectment precluded the plaintiff in this action from asserting in another action any legal title which he held or could have made available on the trial of the former action, but does not debar him from asserting a subsequently acquired title which was not in issue and could not have been put in issue in that action. The plaintiff having acquired the title of Vallejo, after the former action was decided, is not precluded from asserting it in this action. A judgment in ejectment is not conclusive, except as against defenses actually made, or legal defenses which might have been made on the trial, but do not preclude a defendant from asserting a title subsequently acquired. This is well settled in this court."

The case of Mahoney v. Van Winkle, 33 Cal. 448, was thus: In 1861 one David Mahoney commenced an action of ejectment against the defendant Green, who answered with a general denial and an averment of title in himself. The case was tried and judgment passed in favor of the plaintiff against the defendant Green, "*for the recovery of the possession of the premises described in the complaint.*" Afterward Green acquired title from the United States by pre-emption, and Mahoney brought ejectment against him. The court say:

"It is insisted that the defendant can not go behind the judgment in the ejectment suit brought against him by Mahoney. The answer to this objection is obvious. The thing forbidden is not attempted here; a new event has happened since Mahoney v. Green was tried and adjudged, and the legal effect of the event is to confer upon the defendant a present right of possession, a right which he did not have at the time of the bringing of ejectment, nor at its conclusion."

"The general rule is well settled in this state and elsewhere that, when title is *put in issue and tried* in an action of ejectment the judgment will conclude the

parties and their privies from again litigating *the same title* in another action between the same parties or their privies. If it were conceded, therefore, that the title which the plaintiffs (who were defenlants in the former action) now hold under their patents is the same title, within the true meaning of the rule, which was in issue, or might have been asserted in the former action, there would be an end of the argument. But in my judgment it is not the same title, within the sense of the rule. While proceedings by the federal government were in progress, plaintiff was liable to be harrassed with litigation in the state courts, impugning his right to the possession. He had no means of preventing such litigation, and when his title and right to the possession were attacked in an action of ejectment, he had no alternative than either to surrender his estate or defend himself as best he might before the state court and jury upon his incipient title, with perhaps vague and ill-defined boundaries. Nor had the state court the necessary machinery or the requisite jurisdiction to investigate and determine the nature and legal effect of Amesti's title so as to conclude him by its judgment from afterwards asserting it when found to be valid and ripened into a perfect title by the tribunals of the United States. These tribunals alone in the last resort could pass an authoritative judgment upon his title or estate, *and when they invested him with the complete title he acquired a new status which he had not before.* I am not, however to be understood as holding that the state courts may not, in any case adjudicate rights claimed under unconfirmed, inchoate Mexican grants. All that the exigencies of the present case requires to be decided, and all that is intended to be decided, is that if such adjudication be adverse to the claimant, the judgment will not conclude him from asserting his rights in a new action after his claim shall have been finally confirmed and patented."

Amesti v. Castro, 49 Cal. 325.

All of the above cases were prior to the adoption by Dakota of the California code.

Thus it appears by authoritative decisions that, under the

Dakota code, the maxim "the plaintiff in ejectment must recover upon the strength of his own title," has no application.

The following cases from that state also seem to us persuasive:

The case of Peoples Savings Bank and Griffin v. Hodgdon, 64 Cal. 95, was thus:

In 1868 the present defendant Hodgdon commenced an action of ejectment against the plaintiff Griffin and others, to recover the possession of a block of land, including the land here in question. In that action she answered denying that Hodgdon had any right or title to the land, and alleged herself to be the owner in fee. Judgment was rendered in favor of Hodgdon for the recovery of the land and Griffin was dispossessed, and Hodgdon placed in possession. All the while the land was subject to a mortgage which was foreclosed after the commencement of the prior action, and in 1870, before the judgment in the ejectment suit, Griffin took a deed under the foreclosure, but did not file a supplementary answer. The court say:

> "It is true that the conveyance was made intermediate the filing of her answer in the ejectment suit and the trial of the action, but the title she got by the conveyance was not the same title she had when the suit was commenced and when her answer was filed. The title she got (under foreclosure) conveyed to her the absolute fee of the property. *This title she did not hold at the time she joined issue in the action. It was therefore not involved in that action and was unaffected by the judgment therein rendered.*"

In Thrift v. Delaney, 69 Cal. 188, it appeared that on January 20th, 1879, while the land in controversy was public land of the United States, the plaintiff completed a homestead entry ac-

cording to the laws of the United States. On April 15th, 1879, the defendant in the later suit commenced an action against Thrift to recover from him the possession of the land covered by his homestead entry. In the complaint it was alleged that the plaintiff was the owner and seiezd in fee of the premises, and that defendant had entered and ousted him therefrom. The defendant appeared and for answer to the complaint denied that plaintiff was the owner or seized in fee of the premises, or entitled to the possession thereof. Upon the trial the plaintiff offered no evidence of paper title, but relied solely on evidence of prior actual possession and enclosure of the land. The defendant contested his right to recover on that ground, but offered no evidence of his homestead entry. The court found and adjudged that the plaintiff in that action was *the owner* of the premises sued for and entitled to the possession, which was delivered to him under a writ of restitution.

Afterwards, on November 5th, 1881, Thrift surrendered his homestead entry receipt and paid for the land in full, and received a patent from the United States, March 15th, 1882, and in November of the same year commenced this action.

The defendant pleaded in bar of the action his former judgment, and the court say:

> "It is insisted by him that when the former judgment was rendered the respondent had perfected his homestead entry, and was in such relation to the source of title that he might have defended successfully against the action, and having failed or neglected to do so, the judgment is conclusive upon all rights he then had or has since acquired to the property involved in it.
>
> "There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters *put in issue and passed on in the action*, conclusive between the parties and their privies, and a bar to another action between the

parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered, and *neither* the parties nor their privies are precluded by the same from showing in a subsequent action any new matters, occuring after its rendition, which give the defeated party a title or right of possession."

"A judgment in ejectment is not conclusive except as against defenses actually made, or legal defenses which might have been made on the trial. It does not deprive a party of the right to acquire a new and distinct title, and, having done so, to assert it without prejudice from the former suit."

Black on Judgments, sec. 656.
Bigelow on Estoppel, 4th Ed., p. 130.

"*Avoiding effect of former judgment.* Whenever, in an action for possession of realty, the question of title is put in issue by the pleadings, the judgment, *prima facie*, constitutes an estoppel to the assertion of any title which existed in the losing party at the time of the former suit. To avoid this estoppel he may show that, by reason of some lease or license, his title could not be asserted in the former suit. Judgment in ejectment never affects after-acquired title. Therefore a defeated party may, in any subsequent suit, show, by parol or otherwise, that the right to the possession has come to him since the former suit."

Freeman on Judgments, sec. 302.

"Where a plaintiff has recovered in an action of trespass *qu. cl. fr.*, such recovery is *res judicata* as between the parties, that plaintiff's possession before the trespass in that suit complained of, was peaceable and prior to defendant's, and of such a character as to entitle the plaintiff to retake it if it could be done peaceably. Such judgment can be used in any subsequent action of trespass to try the title, by either of the parties or their privies, for the recovery of the same land,

and will estop the defendant from alleging the same title in a subsequent action of ejectment. But if the defendant, after the rendition of the judgment, *acquires title by purchase, he is not stopped from alleging that fact;* and such judgment will not be a bar for the reason that the matter in issue is entirely different."

Herman on Estoppel and Res Judicata, Sec. 208.

"It is not the former recovery which constitutes the estoppel. It is the decision of the question which was in contestation between the parties, and the estoppel rests, in ejectment as well as in other cases, upon the familiar principle that when the same point has been litigated between the same parties, and decided by a court of competent jurisdiction, it can not be again called in question. *The same principles apply to defenses as to the plaintiff's title, and a former judgment does not deprive the defendant of the right to set up a subsequently acquired title as a defense.* To sustain a plea of former action pending, it is conceded that it must appear to the court that the first action is for the same cause as the second. This requirement is strictly enforced. It is not enough that the property in controversy in both actions is the same."

Dawley v. Brown, 79 N. Y. 390.

"A judgment in ejectment rests upon the title in being at the commencement of the suit."

M. C. R. Co. v. McNaughton, 45 Mich. 87.
Snyder v. Hemingway, 47 Id. 549.
Hemingway v. Drew, Id. 554.

Counsel says, upon page 19 of his brief:

"*In this case* both parties claim under the same source of title—from a common grantor. Both admit that the land belonged to the United States on July 2, 1864."

Yes, in this case, they do, but in the former action they

did not. Plaintiff said it had a right of way, but *did not* say that it obtained it from the United States or that the United States owned the land July 2, 1864, or at any other date, or that it was public land or ever had been, and it said that defendant was a trespasser and the tenant of trespassers. It did not connect the title of either party with the United States, nor did it mention the United States, except by way of inducement in setting out its corporate existence.

The trouble with the hypothetical case, stated by counsel upon page 20 of his brief, is that it has no application to the case at bar. Here A did *not* declare "that C, being the owner of the land at a certain time, made on a day named a valid conveyance to A," nor was it "adjudged that such conveyance is good and passed to A a title to the property, or at least what interest C had." The premises are false and with them falls the conclusion.

The last proposition of counsel is that, assuming that there was a conclusive adjudication as to part of the premises in question, defendant in error is thereby precluded from asserting even an after acquired title to the rest. He could not, it is said, "by taking possession consecutively of small pieces of one entire parcel of land compel the company to re-litigate with him as to each piece its title, which attached to the whole if it attached at all." That is not this case, but if it were, why could he not, if he had a different title to each, if the holder of a coupon bond can maintain successive suits upon the coupons and another upon the bond? This court has repeatedly held that that could be done.

Referring now to authorities cited in behalf of plaintiff in error upon this branch of the case, we have to say as follows:

In the case of Bryan v. Kennett, 113 U. S. 179, the plaintiff attacked the defendant's title upon three grounds, "*first*, it was not competent for the bank to have Austin's interest sold under execution on a judgment while it held a mortgage on part of the premises sold and thus cut off his right of redemption; *second*, the sheriff's deed to Ross was void for want of a seal or scroll affixed thereto; *third*, the deed from the bank was not under its corporate seal; and these matters all appearing upon the fact of the record, in the suit of Deane v. Bryan, instituted in 1836, no title passed by the decree therein, even if the court rendering it had jurisdiction." The court, Mr. Justice Harlan delivering the opinion, said:

> "These propositions were *necessarily involved* in the determination of that suit, and, so far as they impeach the correctness of that adjudication, are not open to re-examination in any collateral proceeding between the same parties or their privies."

We do not understand upon what theory counsel has cited Davis v. Brown, 94 U. S. 423. Substantially such a proposition as he here contends for was advanced in that case, and in reply thereto the court say as follows:

> "When a judgment is offered in evidence in a subsequent action between the same parties, upon a different demand, it operates as an estoppel only upon the matter *actually at issue and determined in the original action.*"

In the case of Hornbuckle v. Stafford, 111 U. S. 389, the contest was as to whether Stafford was entitled to thirty-five inches of the water of Avalanche creek, *in his own right*, or whether he held such right *in trust* for the company. There had been a former action of Gallagher v. Basey, (20 Wall. 670), from the report of which it appears that at the May term of the district court of the territory, in 1871, the court heard the whole case "on the pleadings, evidence and proceedings

therein, and the findings of the jury"; and, in July, 1871, rendered a decree adjudging that Stafford was entitled to the thirty-five inches of the water. The court say:

> "A copy of the complaint and answer in the case of Gallagher v. Basey and others is set out in the bill of exceptions. An inspection of the excluded testimony shows that the complaint and answer do not in any decree tend to support the contention of appellants, to-wit, that the thirty-five inches of water awarded appellee by the decree was awarded to him *in trust* for the Hellgate & Avalanche Ditch Company. The company is *not mentioned in the pleadings*, and there is no averment that the appellee held the water right claimed by him for any one but himself."

> "While, therefore, the appellants were entitled to put the complaint and answer in evidence as a part of the record, it is clear that the exclusion of the pleadings in no degree prejudiced their case. The decree will not be reversed for such an error. Gregg v. Moss, 14 Wall. 564.

> "The apellants next contend that the decree should be reversed because the court excluded evidence offered by them to show that the consideration on which the appellee became a member of the Hellgate & Avalanche Ditch Company, was the conveyance of his water right in Avalanche Creek to the company. The evidence was properly excluded, because this issue had been passed upon in the case of Gallagher and others v. Basey and others, between the same parties, and decided, as appears by the decree of the court, against the contention of appellants."

In Chapman v. Smith, 16 How. 114, the defendant sheriff and his sureties were sued for neglect in levying an execution, and the branches assigned were, *first*, that there were goods of the defendant in the execution of which the sheriff could have levied the money, but that, not regarding his duty, he neglected and refused so to do; *second* and *third*, that he did make a levy upon the goods but neglected and refused to sell

the same. It appeared that, in a former proceeding under the statute of Alabama, an issue had been formed upon the charge of the plaintiff against the sheriff for returning the execution without having levied the money thereon, and that the same might have been collected if due diligence had been used by the sheriff, and that, upon the trial, the jury found in favor of the defendants. The court say:

> "Here we can not help seeing that the matters sought to be put in issue by the replication are those *necessarily involved* in the former trial, and to uphold it would be to permit the same facts to be adjudicated over again."

We have already cited and quoted from Packet Co. v. Sickles, 5 Wall. 580.

In Miles v. Caldwell, 2 Wall. 35, the court say:

> "The defendant alleges 'that both questions *were submitted to the jury* and decided against complainant in the action of ejectment, the judgment in which is now sought to be enjoined. Of the fact of such submission and finding there can, in this case, *be no doubt* Under the instructions of the court, which are in proof in this record, if the jury found either of these issues in favor of Caldwell, the plaintiff was not entitled to a verdict. The plaintiff, however, did get a verdict. *It thus appears conclusively that the jury found that there was no fraud in the second mortgage, and that the first had been satisfied.*"

In Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, the court held, Mr. Justice Brown delivering the opinion, that a judgment for the defendant in an action for taxes for *one* year, on the ground that the property was exempt, was not a bar to an action for taxes on the same property for *another* year.

In Nesbitt v. Ind. Dist., 144 U. S. 610, the court held that

interest coupons form separate causes of action from the bonds themselves, and that a prior judgment on the coupons that the recitals of the bonds prevented the defense of a prior indebtedness beyond the constitutional limit, does not, in an action on the bonds, preclude that defense. This case quotes from Cromwell v. County of Sac, and we have quoted from it, (*supra*).

The case of Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, involved the validity of a tax assessed upon a branch road, in the year 1891, under an act passed that year. The company pleaded in bar a judgment in a former action holding that a portion of the main line was exempt from taxation for a prior year. In the opinion delivered by Mr. Chief Justice Fuller, the court say:

> "The distinction between the road from Halifax to Weldon, and the main road from Wilmington to Halifax, was not adverted to; and even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case *can not operate as determining what might have been but was not brought in issue and passed upon.*"

The reference to Smith's Leading Cases, and the English case of Outram v. Morewood, are, as we think, sufficiently answered by the reference thereto in prior decisions of this court.

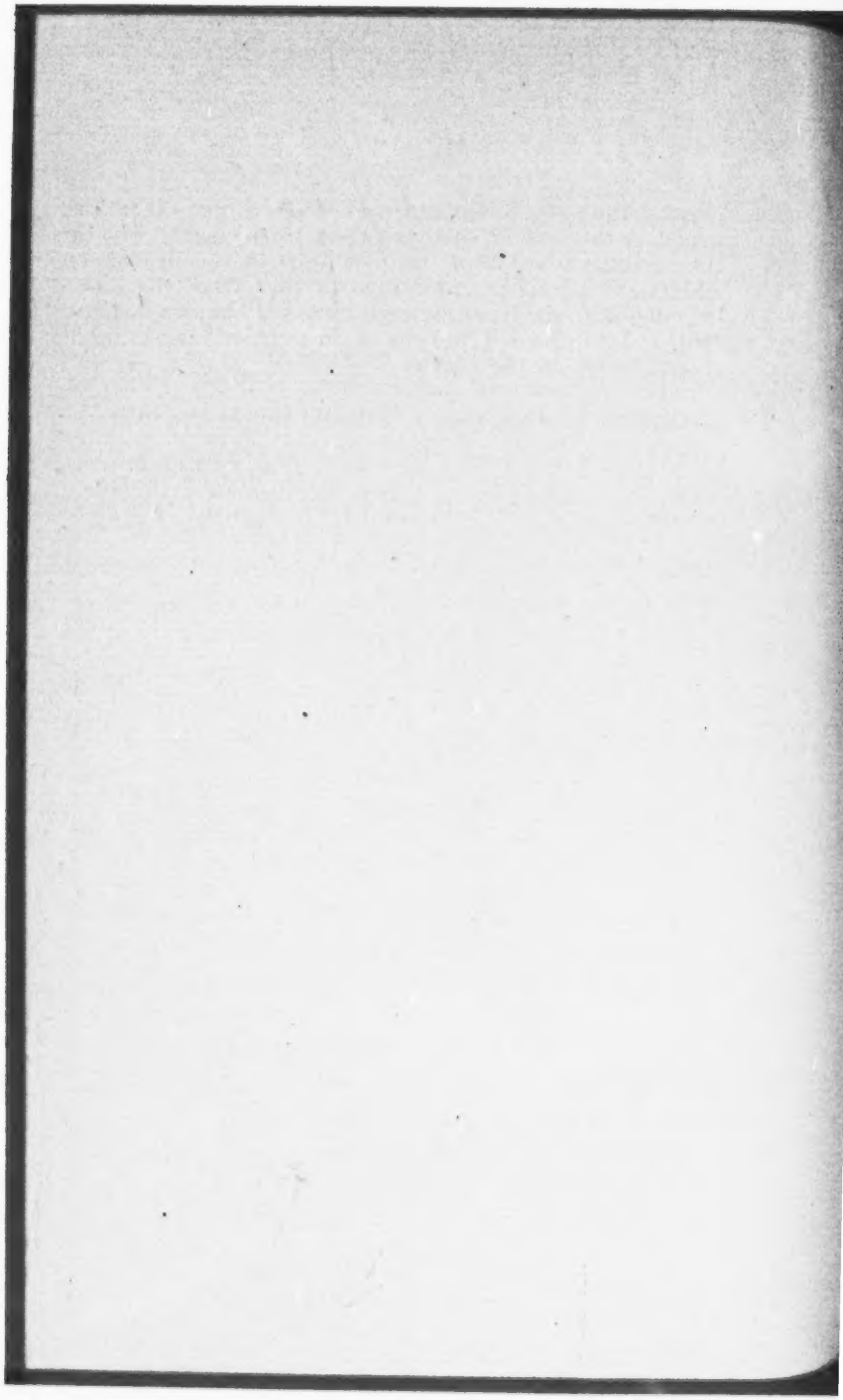
Counsel also cites Aurora City v. West, 7 Wall. 82, and Beloit v. Morgan, Id. 619. Both of these cases were cited in the dissenting opinion in Cromwell v. County of Sac, and, in so far as they contravene any proposition established by that case, must be considered as unavailing; but the following quotation from the former seems to us to show that there is nothing therein opposed to our contention.

"Courts of justice, in stating the rule, do not always

employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties." * * *

The distinction between such a case and this is evident.

H. F. STEVENS,
Counsel for Defendant in Error.



No. 93.

Br. of Stevens for D. E.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

Filed Mar. 4, 1898.

No. 93.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

Brief for Defendant in Error, on Re-Argument.

H. F. STEVENS,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES,

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SUPREME COURT OF THE UNITED STATES,

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No. 93.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

RESPONDENT'S BRIEF ON RE-ARGUMENT.

The case having been ordered to be re-argued attention has been directed to three questions, viz:

> 1. Could occupants of public lands before they were surveyed and declared open for settlement, by subsequently availing themselves of the town-site act, procure a title paramount to that of a railroad company which, under a previous grant by congress, had taken possession before the town-site patent was granted?
>
> (See Northern Pacific Railroad Company v. Colburn, 164 U. S. 383.)

2. Assuming that the town-site title was, in point of law, prior to that of the railroad company, could the city of Bismarck or its grantees maintain an action of ejectment against the railroad company?

(See Roberts v. N. Pac. Railroad Company, 158 U. S. 10.)

3. Could Patrick R. Smith, as a grantee from the city authorities, subsequent to the actual possession by the railroad company, maintain either ejectment or an action for the value of the land?

We shall, in the main, confine ourselves in this brief to the matters suggested by said questions. Before referring to the pertinent facts we call attention to the following statutes:

R. S. § 2387—

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court, for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

Chap. 67, Laws Dakota, 1862.

"Section 1. Any person settled upon the public lands belonging to the United States on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done to the same, also an action

to recover the possession thereof, in the same manner as if he possessed a fee simple title to said lands."

Chap. 15, Laws Dakota, 1868.

"Provided further, that the damages accruing to any occupant or owner, or other person who may reside or have improvements on said lands, shall be determined and paid by said railroad company as heretofore provided in this subdivision."

Also the following additional extract from Section 7 of the charter of the Northern Pacific Railroad Company:

"And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth."

It is important that the facts in the case be clearly understood by the court and that, if the record be not solely resorted to for that purpose, no misstatements should prejudice the rights of either party. Counsel for plaintiffs in error, in both of his briefs, as it seems to us, has made statements which would have that effect if not corrected.

We trust the court understands that the premises in question constitute a business block in the heart of the City of Bismarck, occupied for commercial purposes, and that there is nothing in the record to show that a foot of it is or ever was occupied by tracks, road-bed or depot grounds, and that there is not and never was a track within more than twenty feet of any portion of it.

The statement in the findings that "the railroad was constructed across this tract in 1873," REFERS TO THE EIGHTY-ACRE TRACT, NOT THE PREMISES IN QUESTION.

I.

The judgment should be affirmed unless the record affirmatively shows error.

We are content to abide by the record, and, if it is meagre in any respect, we submit that that fact does not furnish ground for reversal. As we understand it, the question before this court is not: "Does it affirmatively appear from the record that the plaintiff below was entitled to recover?" but rather, "Does it affirmatively appear from the record that the courts below erred in their judgment?" for, as said in Burr v. Des Moines Co., 1 Wall. 99: "The legal presumption is in favor of the correctness of the judgment below." And, in Lumber Co. v. Buchtel, 101 U. S. 633, "It was for the defendant to see that findings were had on all matters material to the defence, as it was for the plaintiff to see that findings were sufficient to support a judgment in his favor." The plaintiff did this by seeing that they contained a statement of a full and clear record title in himself.

In Campbell v. Boyereau, 21 How. 759, it was said that "where no question of law or fact is sufficiently presented for review, as the circuit court had jurisdiction of the subject matter and the parties, its judgment must be presumed to be right," and, in N. Y., etc. Mining Co. v. Frazer, 130 U. S. 611, that "to obtain a reversal of a judgment, it is necessary that the fact upon which such reversal is claimed should appear from the record, sufficiently to be passed upon."

And, in Stanley v. Supervisors, 121 U. S. 535, "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the arguments that, upon the evidence, the findings should have been different."

II.

The court below has found that these premises were entered and were conveyed to plaintiff under the townsite act. (R. S. Sec. 2387). This fact implies a valid entry and a valid conveyance, and neither is collaterally assailable.

From such finding, this court, as it seems to us, must conclusively presume the truth of the recitals of the deed, which we may presume was introduced upon the first trial, before the jury, and that the same, after reciting the entry and subsequent proceedings in compliance with the territorial statute, proceeded as follows:

> "And whereas * * * it appears that the lot, tract "and parcel of land hereinafter described, being a por- "tion of the same entered by me in trust for the occupants "of said townsite, was and is occupied and improved "by Patrick R. Smith, of Bismarck, in said County of "Burleigh, and that he is entitled to a deed therefor, "Now, therefore, in execution of the trust vested in me by "said act of congress, and in pursuance of the laws of "the territory of Dakota, in consideration of the premises "and of *five dollars* to me in hand paid by Patrick R. "Smith, the occupant of said tract, I, George Peoples, "mayor of said city of Bismarck, have granted, sold and "conveyed, and by these presents do grant, sell and con- "vey to Patrick R. Smith, of the said city of Bismarck, "all the following described lot, piece and parcel of land, "situate, lying and being in the county of Burleigh and "territory of Dakota, and described as follows, to-wit: "(description of premises in question)."

The following authorities, we think, support this proposition:

In Chever v. Horner et al, 142 U. S. 122, referring to the townsite act, the court quoted with approval the following language of the supreme court of Colorado:

> "Under the acts of congress above mentioned, and the provisions of the act of the territorial legislature in aid thereof, the probate judge, holding the title to the

townsite in trust for the beneficiaries, *was authorized to convey the lots and parcels of land therein to those entitled to the same.* This was a general jurisdiction over the subject matter, analagous to the jurisdiction of the land department of the government over the issuing of patents of lands subject to entry under the land laws of the United States. Being invested with title and jurisdiction, Probate Judge Downing conveyed the lot in controversy to John Hughes, from whom appellee Horner deraigned title, more than seven years prior to the conveyance by his successor, Judge Kingsley, to the appellant, Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face, and purports to have been executed in pursuance of the authority vested in the grantor, *it is not open to attack in this collateral proceeding for defects or omissions in the initiatory proceedings.*' And it was accordingly held, as the deed was of that character, that the presumption was that the proper initiatory steps had been taken in conformity with law."

And in U. S. v. California & O. Land Co., 148 U. S. 31:

"It is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus, in the case of U. S. v. Arredondo, 6 Peters 691, 729, this court said: 'It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decisions made or the acts done by the tribunal or officer, whether executive, (Marbury v. Madison, 1 Cranch, 170, 171), legislative (McCulloch v. State, 4 Wheat. 423; Satterlee v. Matthewson, 2 Pet. 412; Bank v. Billings, 4 Pet. 463), judicial (Perkins v. Fairfield, 11 Mass. 227; McPherson v. Cunliff, 11 Serg. & R. 429, adopted in Thompson v. Tolmie, 2 Pet. 167, 168), or spe-

cial (Rogers v. Bradshaw, 20 Johns 739, 740; Shand v. Henderson, 2 Dow, 521, etc.) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

Such also is the uniform doctrine of the states and territories in which the act has been chiefly operative.

In Sherry v. Sampson, 11 Kan. 611, the supreme court said:

> "When the probate judge has made a deed for any portion of said lands to any person, it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person; and a person who has no interest in the land will not be allowed to raise any question as to whether the probate judge has made the deed to the proper person or not."

Again, in Mathews v. Buckingham, 22 Kan. 166:

> "As the law presumes that every man in his private and official character does his duty until the contrary is proved, both the patent and the town company deed were properly admitted."

And, in Riggs v. Anderson, 47 Kan. 66:

> "The legal title to the townsite passed from the government to the probate judge, and from him to the town company; and the latter had issued a certificate by which it parted with all its interest in the lot in question, except conveying the legal title, which it held for the benefit of the certificate holder, his heirs or assigns. It will be presumed that the probate judge deeded the land to the proper party."

And, in Marysville Inv. Co. v. Munson, 44 Kan. 491:

> "When the probate judge has made a deed for any portion of said land to any person, *it will be presumed, in the absence of anything to the contrary, that he has made the deed to the proper person;* and a person who has no interest in the land will not be allowed to raise any question as to whether the probate judge has made the deed to the proper person or not. See also Marysville Inv. Co. v. Hall, 49 Pac. 332."

In Tecumseh Townsite Cases, 3 Neb. 267, the court said:

> "The trustee under said legislative act, in deciding who are entitled to lots under the trust, acts in a judicial capacity, and his decision can not be assailed in a collateral proceeding, though it may be impeached for fraud. Where a statute, which confers the means of acquiring the right, prescribes an adequate, special, mode of determining by judicial investigation the fact upon which the right depends, that mode is exclusive."

And, in Green v. Barker, 47 Neb. 934

> "It is insisted that it should have been shown that the city of Grand View had been incorporated, and that the parties to whom transfers had been made were occupants of the premises or portions of the property conveyed to them; or, in other words, it was necessary that proof be made that the parties to whom the deeds were made were the proper ones, that all the acts to be performed had been done, or the facts required to exist by the statute were existent at the time of the execution of the deeds. These were matters to be investigated and determined by the person holding the trust, and upon whom it devolved as a duty, on demand by the proper party, to make a deed,—in this case, the chairman of the board of trustees of the city,—*and his settlement of the question was not subject to collateral attack.*"

In Anderson v. Bartels, 7 Col. 256:

> "In an action of ejectment for part of a townsite on the public domain, a deed which is regular upon its face and executed by the officer entrusted by the government with the legal title, and duly authorized to convey it, is not impeachable for failure to comply with any preliminary requisites."

And in Murray v. Hobson, 10 Col. 66:

> "Whether the title was rightfully conveyed to the grantee, is a question for the city authorities, and not for one not then a beneficiary of the trust."

In McCormick v. Sutton, 97 Cal. 372, the court said:

"When a patent has issued to a townsite, a deed from the town authorities of a town lot carries to the grantee a perfect title, when no mine had been discovered and the land was not known to be mineral at the date of the patent. (Davis v. Weibbold, 139 U. S. 507) and the regularity of the conveyance from the authorities of the townsite to the claimant of a town lot can not be afterwards questioned collaterally."

In Ming v. Foote, 9 Mont. 201, the court said:

"*By the terms of the grant the probate judge was the officer and representative of both the federal and the territorial governments in the disposal of these lands.*"

In Tucker v. Whittlesey, 74 Wis. 74, the court said:

"On the part of the defendants an effort was made to prove that the premises had never been occupied as required under the townsite law; but this was not an open question, so far as the defendants were concerned."

And, in Tucker v. R. R. Co., 91 Wis. 576:

"The powers and duties of the county judge under this act are analogous to those exercised by the land department of the United States in granting a patent, and the execution of a deed by such judge is substantially an official determination, which he is authorized to make, that all the requirements preliminary to the execution of the deed have been complied with, and that the person to whom it has been issued is entitled to it. No one who is not a beneficiary of the trust, but a mere stranger to the title, as the defendant is here, can call in question the validity or regularity of such conveyance, or, by subsequent entry or intrusion upon the premises, put parties claiming under such conveyance to the proof whether all the steps prescribed by law have been taken, or whether the party to whom the deed was executed was the person rightly entitled thereto. These questions can only be litigated by some one interested in the trust, and by direct proceedings for that purpose. Taylor v. R. R. Co., 45 Minn. 66; Murray v. Hobson, 10 Colo. 66; Ming v. Foote, 23 Pac. 515; Cheever v. Horner, 11 Colo. 68; Smelting Co. v. Kemp, 104 U. S. 640; Moffat v. U. S., 112

U. S. 24. These and many other authorities that might be cited to the same effect are quite sufficient to show that the deed from the county judge to Whittlesey and Tucker was not open to collateral attack by the defendant."

In Taylor v. R. R. Co., 45 Minn. 66, the supreme court of Minnesota said:

"The execution of a deed to a part of a townsite by the judge, who is trustee for that purpose, is analagous to the grant of a patent by that department of the government whose province it is to supervise the various steps necessary to be taken to obtain title. The execution of a deed by the judge is in the nature of an official declaration and determination by him that all the requirements preliminary to the execution of a deed have been complied with, and that the person to whom it is issued is the person entitled to it. The doctrine of presumptions in favor of official acts obtains,—that the judge did his duty in all respects, and had required the grantee to show by legal proofs that he was the party entitled to a deed, and that he had complied with all the necessary pre-requisites to its execution. Moreover, when a trustee in whom is vested the land constituting a townsite, in trust for the occupants, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, no one who is not a beneficiary of the trust but a mere stranger to the title, as is the defendant here, can call in question the validity or regularity of such conveyance, or, by subsequent intrusion upon the possession, acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. Anderson v. Bartels, 7 Colo. 256; Murray v. Hobson, 10 Colo. 66; Cheever v. Horner, 11 Colo. 68; Matthews v. Buckingham, 22 Kan. 166; Ming v. Foote, 23 Pac. R. 515; Whittlesey v. Hoppenyan, 72 Wis. 140; Smelting Co. v. Kemp, 104 U. S. 636. The rule contended for by the defendant would not only be against all precedent, but would lead to the gravest practical evils. If mere intruders or strangers to the title under the trust could compel the party holding under the trustee in every suit for possession to prove that the grantee was the beneficiary of the

> Trust, and that the trustee had complied with all the requirements of the statute, then, of all titles, those under these town-site entries would be the most uncertain and unreliable; and the lapse of time would only render them more so, because of increasing difficulty in making proof of the facts."

The case of Ashby v. Hall was *not*, as we understand it, one of collateral attack upon a deed from corporate authorities to an original occupant. Plaintiffs had received deeds of their lots according to a plat in existence at the time of the entry of the town-site, according to which their lots abutted upon an alley. Afterwards the authorities made a *new plat* which purported to vacate the alley and embraced it within the limits of one of the *new lots*, which they assumed to convey to defendant, who enclosed it by a fence. Plaintiffs sued to abate the obstruction and succeeded; the court holding that "the entry of the platted town-site carried with it the right of way over streets and alleys shown thereon. The streets and alleys were not afterwards at the disposal of the government."

III.

The court below has not found that defendant ever occupied any part of the premises in question.

The only affirmative statement in the findings connecting the railroad company, as such, in any way, with the lots in question is that they "are within 200 feet of the main track of this railroad, as actually constructed." If, as is usual, the lots are but 150 feet deep, it does not follow that any portion of them is nearer than 50 feet to the track. The negative statement that "no part of the same, except the rear 25 feet thereof, has ever been occupied for railroad purposes," is not sufficient under the authorities above cited.. Would it be sufficient ground for reversal of a judgment in favor of a plaintiff in

ejectment that it appeared that "no portion of the premises in question, except the rear 25 feet thereof, had ever been owned by defendant"?

We further assert that it nowhere even inferentially appears that the railroad company ever had possession of any portion of the premises in question prior to Dec. 1, 1885.

The original reply, as we think we can demonstrate to the satisfaction of the court, admitted unlawful possession by defendant "*through its tenants*," for a period of EIGHT (not eighteen) years, prior to the commencement of the action, but the complaint alleges (Fol. 3½) "That said defendant, more than six years prior to the commencement of this action, wrongfully and unlawfully went into possession of the premises * * and that the use and occupation thereof *during said time* was worth at least $5,000 a year." Six years, as we have already stated, is the statutory period of occupation for which such an action can be maintained. That, therefore, is the "period in question" in this action, as intended by the court in its findings (Fol 19) and not eighteen years, as erroneously assumed by counsel for plaintiff in error.

While the complaint alleges that plaintiff became seized in fee on Sept. 14, 1876, it was unnecessary to have alleged such seisin prior to Dec. 28, 1885, and it could not truthfully have alleged it prior to date of entry, for, as held in Ashby v. Hall, 119 U. S. 526, that was the date of the commencement of plaintiff's "estate in fee". The court in that case said:

> "The right of way, and all appurtenances to the lots, which were held by the occupants under their possessory claims, *continued after the entry*, and the receipt of their deeds, or other evidence of title, as before, *with the additional support* arising from the change of their *possessory claims to estates in fee.*"

It was enough for the purposes of this action to allege title. It was not necessary to allege source or duration of title. That was matter of proof, and the finding of the court that the premises were entered under the townsite act, (R. S. §2387) by the corporate authorities and by them conveyed to the plaintiff, implies that, at the date of the entry and at all times before, plaintiff was the occupant; because, as we have seen, they could be entered only for the benefit of, and conveyed to, the *occupant*.

IV.

No question as to the efficacy of the townsite settlement, entry, patent and deed is available here, because not raised below.

This proposition is submitted with great deference, but we cannot escape the conviction that the questions suggested by the court have been occasioned by the fact that the record is meagre in that respect. This is due to the fact that, until counsel for plaintiff in error, in his supplemental remarks, on the second day of the former argument, raised the point, the effect of the townsite proceedings was never questioned, but, throughout two trials in the circuit court and two arguments in the circuit court of appeals, IT WAS ASSUMED THAT PLAINTIFF'S TITLE WAS SUFFICIENT, UNLESS THE FACT THAT THE RAILROAD WAS CONSTRUCTED WITHIN 200 FEET OF THE PREMISES GAVE IT A PARAMOUNT TITLE, NOTWITHSTANDING THE FILING OF ITS MAP OF DEFINITE LOCATION ELSEWHERE.

The case of Houghton v. Jones, 1 Wall. 702, was an action of ejectment where the plaintiff deraigned her title from the Mexican government and it did not appear from the record that the grant was ever confirmed according to law by the board ap-

pointed for that purpose, or was ever presented to the board for its consideration. Speaking of the contention of counsel for reversal upon this ground, Mr. Justice Field, delivering the opinion of the court said:

> "His position is, that under the act of March 3rd, 1851, if the grant were not presented within the period there designated, which period had expired when this action was commenced, the land was to be deemed a part of the public domain, and that no presumption is to be indulged in in respect to such presentation, in the absence of any averment on the subject. *It is a sufficient answer to this position, that it does not appear from the record to have been urged in the court below.* It may be that the objection was not taken, from the knowledge of the parties that the grant had been confirmed, and that proof of the fact *could be readily produced.* Objections of this kind can not be heard for the first time in the appellate court. To entitle objections to consideration here, they must be presented to the court below, in the first instance, at least if they are of a kind which might have been there obviated."

So, in Springer v. United States, 102 U. S. 593, the court said:

> "The point was not brought to the attention of the court below and cannot, therefore, be insisted upon here."

V.

But, if we are wrong in this position, then, in view of the questions to which the court has specially directed attention of counsel, we respectfully request the court to bear in mind:

1. That the townsite in question was located on an even-numbered section, no portion of which was ever granted to the railroad company, unless it had an unlimited and continuing grant of right of way.

2. That "possessory rights" of occupants of the townsite attached in the year 1872, to which date the subsequent entry, patent and deed related back,

3. That plaintiff never "purchased" the premises in question and never was the "grantee" of the City of Bismarck, in the ordinary sense of those words;

4. That the action was not brought to recover damages for the taking of plaintiff's land for the right of way of a railroad, but to eject defendant from a city business block, and to recover as damages the value of its wrongful use and occupation for a period of six years prior to the commencement of the action, which is the period allowed by the statutes of Dakota, and not to recover any damages for its future use.

5. That the use of the words "eighteen years" in the printed record of the reply (Fol. 8) is a mistake and that the original reply reads "eight years."

VI.

Rights of town-site occupants as affected by change of location.

There can be no possible doubt that the definite location and grading elsewhere exhausted the company's rights under its charter grant of right of way.

It is not necessary for us to deny that, even then, if the company had changed its location to a tract of public land free from any claim of others, no individual could question the change so long as the government sees fit not to do so.

It was upon such grounds that the decision in Washington & I. R. Co. v. Cour d'Alene R'y N. Co., 160 U. S. 77, proceeded. The court say:

"It further appeared that the land in question was *occupied by the railroad, side-tracks and depot* of the defendant, and that *neither the plaintiff nor any person for it ever made or did any act upon the premises or took any possession thereof.*" And "Regarding this question as *one entirely between the Cour d Alene Railway and Navigation Company and the United States.* * * * no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened." And again, "If the United States could not and do not complain there is no foundation for the plaintiff company to do so."

But what was the situation here? In *1872* a town-site was platted on an *even-numbered* section and occupied, and 30 buildings erected thereon, and the improvements rapidly progressed (Fol. 18). In May, 1873, the railroad company filed its map of definite location and the same was duly accepted and approved, covering the line of its grading, two miles south of the town-site. *Up to that time* its grant was "afloat", and the townsite occupants and all others located upon what were public lands at the date of its charter, were liable to be dispossessed. *From that moment* that liability ceased. The grant which had previously been "afloat" became "definitely located." From that moment the occupant of every foot of the eighty-acre townsite tract held a "possessory right" which was paramount to the rights of every one else except the government. An inchoate right, which had its inception in the first occupancy for townsite purposes, became *vested* even as against the government when the entry was made, and *absolute* when the patent issued, which related back to the inceptive act of original occupancy for the purpose of cutting off all intervening claims.

It was not essential that the townsite occupants' rights intervened between the date of the definite location and the

change of line, for those rights were created, not by *estoppel*, but by the townsite statute.

But, even if it were, the townsite patent and deed, as we have seen, until directly assailed, raise the presumption, if necessary, in aid of the judgment, that his rights *did* so intervene.

We think this was distinctly held in Ashby v. Hall, 119 U. S. 526, 529, where the court say:

> "That portion of the town know as Scott's Addition, within which is the alley in controversy, was laid out and platted into streets, alleys, blocks, and lots, as early as 1866; and the lots were occupied, in conformity with that survey and plat, when the entry was made. The right of way, and all appurtenances to the lots, *which were held by the occupants under their possessory claim, continued after the entry*, and the receipt of their deeds or other evidences of title, as before, with the additional support arising *from the change of their possessory claims to estates in fee.* The power vested in the legislature of the territory * * * could not authorize any diminution of the rights of the occupants, when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy."

In Shepley et al. v. Cowan et al., 91 U. S. 330, the court said:

> "But whilst, according to these decisions, no vested right as against the United States, is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

See, also, McCreery v. Haskell, 119 U. S. 327.

In the case of Hussey v. Smith, 99 U. S. 20, it appeared that under this act, in Nov. 1871, one Wells, as mayor of the city of Salt Lake, entered certain lands in the territory of Utah as the "townsite" of said city, wherein was included the lot which was in controversy. The court say:

> "On the 30th day of September, 1868, Job Smith, then and for many years prior thereto in possession of the lot, and the owner thereof, subject only to the paramount title of the United States, executed to one Bernhisel a mortgage of all 'his right of possession, claim, and interest in and to the lot,' to secure the payment of a certain sum of money in one year thereafter. * * * There can be no question that, under the act of March 2, 1867, Smith had an equitable interest in the premises which he could sell and convey."

The Department has held (1 L. D. 503) that

> "It is not necessary that a declaratory statement be filed at all, except to save the rights of the town in the event of a public sale, as indicated in section 2388 Rev. St."

One of the earliest cases arising under the substantially similar town-site act of 1844, and the decision in which has been approved by all the courts in which the question has subsequently arisen, was that of Leech v. Rauch, 3 Minn. 448, where the court said:

> "It will be observed that, before it is lawful to enter land under this law, it must have been settled upon and occupied as a townsite. If such be the case, it may be entered for the 'several use and benefit of the occupants thereof.' This latter clause is in close connection with that prescribing how the land shall be occupied,and it is a natural inference that the occupants referred to in both clauses are the same persons. Government does not part with its title until a certain condition or conditions have been complied with. The condition is that the land has been settled upon and occupied in such manner that it is not 'subject to entry under the existing pre-emption laws.' *When such settlement has been made, the occupants under this act acquire certain*

vested rights. They are entitled to have a trust established and declared in their favor. * * *

"Nor can this right be in any manner affected by any delay on the part of government to recognize it by the proper evidence of title, since the right is in no manner based upon the existence of such evidence. The duplicate and patent are merely the evidence of the existence of the right previously acquired, convenient and perhaps necessary for the enforcement of the right, but not conferring it. *They are the effect and not the cause.*

"It would lead to far greater injustice, by holding that the settlers upon and occupants of a townsite, having complied with all the provisions of the act entitling them to enter the premises, can yet acquire no rights which are not subject to be divested by strangers, *until actual entry of the site.* It would open a wide door to litigation, and go far to defeat the beneficent provisions of the law."

The same court had already held, in Davis v. Murphy, 3 Minn. 119, as follows:

"We are bound to suppose that in order to have become the 'proprietors,' they have done all that the act of congress contemplates, to acquire such an occupation as would entitle them, in preference to any other persons, to claim and receive the land from the trustee. This is certainly an interest in the land, inchoate, it is true, yet nevertheless valuable; it is authorized by law, and laws are made to provide the means of perfecting it into a title in fee. It may be defended against all encroachments from persons not having a paramount right. It is more than a mere right to the possession, because it contains the germs which will expand and ripen into a perfect title."

In Winfield Town Co. v. Maris, 11 Kan. 128, the Supreme Court of Kansas said:

"The act of congress *creates the right* and prescribes who shall be entitled thereto; the legislature provides the rules by which the rights are ascertained and determined. Before there can be an entry the land must be settled upon and occupied by a certain number of in-

habitants. The moment the land is entered the trust *vests an absolute right* in the beneficiaries."

And in Fessler v. Haas, etc., 19 Kan. 216, speaking of the right of a town-site settler before entry, the same court said:

> "It seems to us, under our statutes respecting contracts for the sale or purchase of public lands, and conveyances of improvements upon such lands, (Gen. Stats. p. 184, sec. 9) and the laws of the United States respecting the proving up of townsites for the benefit of the occupants, that it must be held that Fessler had sufficient interest in the property to be reached by process of the courts, and to sustain the attachment."

Again, in Rathbone v. Sterling, 25 Kan. 444, where the opinion was delivered by Mr. Justice Brewer, the court said:

> "We understand the scope of the act of congress, as well as of the state statute to be *to secure to each occupant the lands actually occupied by him.* This is a fixed and vested right; something not resting in the discretion or dependent upon the award of the commissioners; the commissioners are to examine and ascertain who are occupants and what lots they occupy; they do not create the right; they simply inquire as to existing rights."

In Reasoner v. Markley, 25 Kan. 443, the doctrine of the former cases was affirmed and it was further held that

> "A settler and occupant upon a piece of land settled upon and occupied as a townsite under the said act of congress has rights in and to the property, although the title may still be in the United States."

And in Greiner v. Fulton, 46 Kan. 405:

> "As the object of the settlement and occupancy of a townsite is totally different from that of a settlement under the act of 1841, (pre-emption act) no legitimate inference can be drawn that the particular manner or requisites of settlement and occupancy in each case must be the same. And the requisites of the act of 1844 as to settlement and occupancy are complied with when these are such as to attain the object in view, namely, the use

of the land as a townsite for the purposes of trade, commerce or manufactures."

In Railway Co. v. Lynch, 13 Nev. 92, the court said:

"We think the respondent had the right, by virtue of his possessory title to the land, as against everybody except the government of the United States, of this state, or of the municipality of the city of Virginia, to prevent such excavations being made to his injury, unless compensation was awarded for the damages resulting therefrom."

In Jones v. City of Petaluma, 38 Cal. 397, it was held that

"Congress, in the passage of these laws, had in view the individual interests of bona fide settlers upon small parcels of the public lands, as well as the common interests of the community of persons, so contiguously settled as to justify the establishment of a town or city; and did not intend the act for the especial benefit of municipal organizations or corporations. And to so construe the law as to authorize, under its sanction, an appropriation of private property to the public use, without compensation, or an arbitrary confiscation of the rights of property for the benefit of municipal associations or corporations, would be a manifest perversion of the leading object and purpose of the law."

And, in Morgan v. Lones, 80 Cal. 317, as follows:

"It is true, as argued for defendant, that the mere possession of public lands gives no right as against the government. But the government has chosen to convey the land to trustees in trust for the occupants. * * * The question is, what was the class of persons whom the townsite act was intended to protect? The act itself designates such class as consisting of those by whom said lands have been 'settled upon and occupied.'"

From these cases we think it clearly appears that the "inceptive act," in the acquisition of a title under the town-site act is the original occupation. This being so, the doctrine announced in Stark v. Starrs, 6 Wall. 402, applies. It was there said:

> "The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, *it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.*"

There is, we submit, in this case, no question of *vendor* and *vendee*. The *real* title was at all times in the townsite occupant and that of the corporate authorities was held solely for his benefit until conveyed to him. Thus, in City of Cincinnati v. White's Lessee, 6 Peters 179, the court said:

> "At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, *the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee.*"

In the case of Mallard v. Anderson, 36 La. An. 834, the property of a townsite occupant was held to be subject to his debts, even before entry. The court said:

> "Under section 2387 the entry of lands authorized to be made by the corporate authorities of towns 'in trust for the several use and benefit of the occupants thereof' is made for the benefit of such occupants, and the title received is in effect the title of the occupants."

In Cerf. v. Pfleging, 94 Cal. 131, the court said:

> "The act of congress provided that the corporate authorities in such cases might enter the lands 'in trust for the several use and benefit of the occupants thereof, according to their respective interests.' The board, therefore, was a mere trustee for the occupants, and by the terms of the act of congress was to execute the trusts under such regulations as might be prescribed by the legislature. * * * *It is obvious that conveyances of*

the title by the city did not affect the tenure by which the land was held; the title was still the possessory title quieted by release to the occupants of the title of United States. It was still affected by the previous acts of the owners as though no new title had been acquired; but necessarily, as also by express provision of the act, the trustees were required to decide in the first instance who were the occupants within the meaning of the act of congress."

In the case of Village of Buffalo v. Harling, 50 Minn. 551, the court held that the corporate authority had no power to dedicate any portion of the patented land to public use, saying:

"We discover no proof that Taylor ever had any title to or interest in the property, except such as may have been acquired by the patent to him as a trustee, before referred to. If we assume that the land thus conveyed embraced that covered by the plat, still it showed only the conveyance to Taylor of the mere legal title in trust for the occupants of the townsite. It does not appear that he had any beneficial interest in the premises. The conveyance of the title to him as a mere trustee in 1860 would not, by the operation of the principle of estoppel, make effectual any dedication of the property which he had assumed to make."

In Georgetown v. Glaze, 3 Col. 230, it was said:

"The purpose of the act of congress is to vest the estate and trust powers, not in the corporation itself but in some one or more of the corporate officials in their official and politic capacity. Nor by construction of law can the entry in the name of the corporate officials enure to vest the estate in the corporation."

And in Smith v. Pipe, 3 Col. 187, the court said:

"Nor does any technical difficulty arise from the circumstance that the county judge or municipal authority is not for all purposes a corporation, even if this be admitted. The legislative will is not to be frustrated by the application of the technical rules which govern private grants. Rutherford v. Greene, 2 Wheat. 196.

"The grant of the sovereign confers upon the donee

capacity to take according to the purpose and to the extent intended. For instance, grant in fee by legislative authority capacitates the heir of the grantee to inherit though he be an alien."

In Burbank v. Ellis, 7 Neb. 156, the court said:

"The municipality does not acquire the legal title to the site. It is held in trust by the mayor, chairman of the board of trustees or judge of the county, for the *use of the occupants* of the town, and those entitled to deeds."

Speaking of such a title, it was said, by way of illustration, in Railroad Co. v. Ingalls, 15 Neb. 123:

"It is a familiar rule that where a contract is made for the sale of land, the vendor becomes in equity and by construction of law a trustee for the vendee of the real estate, and the vendee becomes a trustee of the vendor for the purchase money. *The vendee is the owner of the land*, although the legal title continues in the vendor. Tiffany and Bullard on Trusts and Trustees, 491; Story's Eq. Juris. sections 790, 1212; Seton v. Slade, 7 Ves. 264; Craig v. Leslie, 3 Wheat. 577; Beverley v. Peters, 10 Peters 532; Henson v. Ott, 7 Ind. 512."

In Leckler v. Chapin, 12 Nev. 65, the court said:

"The land department of the government in its rulings declares that the only beneficiaries of the trust, under the townsite law, are *the occupants of the town*. (I Lester Land Laws 435.) The several courts wherein this question has been presented have uniformly announced the same doctrine. (Leech v. Rauch, 3 Minn. 451; Carson v. Smith, 12 Minn. 560; Winfield Town Co. v. Maris, 11 Kan. 148; Sherry v. Sampson, 11 Kan. 615.) These decisions were nearly all rendered under the act of congress, approved May 23rd, 1844 (5 U. S. S. 657.) But the provisions of the act of 1867, in so far as this question is concerned, are identical with the provisions of the act of 1844."

Attorney General Black (1 Lester's L. L. 431) thus discussed the question:

> "It is very clear that when the mayor, in the execution of his official duty, entered the land on which the city stands, acknowledging all proper obligations and trusts which he could and should have assumed for the benefit of the occupants, *their title (that of the inhabitants) became perfectly good, and that it must be enforced in any court of law or equity.* The object of the law is to give the owners of the lots a good title to their property. When the patent issues under this entry they will have a good title."

It affirmatively appears from the record (Fols. 14 and 19) that defendant in error was in possession of at least a portion of the premises in 1876, and it does not appear (whatever the judgment in the Dakota suit of 1877 may have been) that he was ever actually dispossessed until some time in the year 1883, which would be "eight years prior to the commencement of the action." (Fol. 7, as corrected.) There is no affirmative finding that he was not continuously in possession from 1872 until 1885, but even *if it sufficiently appeared from the record* that the railroad company had unlawfully taken possession of the premises after the original occupancy and held such possession at the date of the townsite entry, that fact would not have deprived the original occupant of the right to his deed, even assuming that such deed were collaterally assailable.

This was held in the case of Pratt v. Young, 1 Utah 347, where the court says:

> "A claimant who was in the bona fide occupancy of a city lot prior to the entry thereof by the mayor, and was wrongfully ousted by an intruder before such entry was made by the mayor, should receive the legal title thereto, notwithstanding the wrongful occupancy of the other at the time of the entry."

To the same effect is the ruling of the Department in Amick v. Carroll (24 L. D. 558), as follows:

> "Where it is shown that a first *bona fide* occupant

> of a town lot, has, through the wrongful or tortious acts of another, lost possession of, or has been ousted from, his rightful occupancy of the lot, which by unjustifiable and illegal means has been reduced to the occupancy and possession of the trespasser, the wrongdoer will not be permitted to profit by his unlawful acts. Although the trespasser may be the sole occupant of the lot at the date of the townsite entry, he will not be permitted to receive his deed therefor; he cannot be held as a *bona fide* occupant. Having been wrongfully dispossessed of the lot and thereafter unable to obtain possession thereof, Amick's occupancy will be considered as unbroken from the date of his first entry thereon."

Counsel speaks of a "*purchase*" by Smith, but there is no evidence of a purchase except from the government, at the minimum price of $1.25 per acre: the consideration, ($5.) for a tract 200x150 ft.,—about three-quarters of an acre—including expenses, negatives the idea of a "*purchase*" from the corporate authorities.

In Berry v. Ginaca, 5 Fed. R. 475, the subject was fully considered by the court, which said:

> "Should the trustee himself advance the purchase money for the inhabitants, he takes the legal title still upon precisely the same trust as if it had come from some other source, and it seems clear that he can not in this way change his relations to the property. He is still nothing but a trustee, and not the beneficial owner. Any attempt on his part to deal with the land as owner, independently, or in disregard of his trust, would be a breach of duty. He can not, by advancing the purchase money, put himself in the position of vendor as between him and his *cestuis que trust*. The 'due proportion' of the purchase money which is or should be paid to him before making a deed *is not purchase money, as between a vendor and purchaser, for which a lien arises when unpaid. It is a sum made payable by the statute, in order that the occupant may not evade his just pro-*

portion of the expenses incident to the purchase of the townsite."

Assuming, now, that the filing of the map of definite location and the grading of that line exhausted the right of way expressly granted, the position of the parties the day thereafter was as follows: The legal title was in the government; the townsite occupants had a possessory right to the respective tracts occupied by them, good as against every one except the government.

They were not trespassers but occupied the public domain by invitation of the government. They have always been considered a meritorious class, and laws are construed in their favor. "Legislation respecting public land is to be construed favorably to the actual settler." Lake Sup. Canal Co. v. Cunningham, 155 U. S. 354.

The railroad company, having exhausted its original and paramount right of selection, still had authority, when deviation from the line of definite location was deemed advisable, to obtain lands needed for railroad purposes by purchase or condemnation, a situation precisely foreseen and provided for in its charter.

Such right, however, could be exercised only according to law, as specifically provided both in its charter and by the general law of the territory. The existence of the *right* did not confer the easement nor define its extent. Such extent is no longer 400 feet in width, but is defined by the charter (sec. 7), thus: "Any lands or premises that may be *necessary and proper* for the construction and working of said road, not exceeding 200 feet on each side of the line of its railroad." Where is the finding in this case that any part of this city block

is "necessary and proper for the construction and working of said road"?

The court will not, by a strained construction of its charter or of the findings of fact, indulge in presumptions in favor of plaintiff in error. The uniform doctrine of the court is to the contrary. In addition to what is said on this point in our former brief, we call attention to the following from the opinion in the case of Fertilizing Co. v. Hyde Park, 97 U. S. 659:

> "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakeable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public wellfare. It is axiomatic in the jurisprudence of this court."

Even if it were conceded that the railroad company, having exhausted its express grant of right of way, might thereafter change its line to any portion of the public lands, so long as the government did not object, such right of new location could certainly not be exercised on more favorable terms than are afforded to a company locating for the first time its line under the general railroad law of March 3, 1875, a former construction of which, by this court, counsel invokes in support of his contention. That is to say, that while the Northern Pacific Charter authorized one definite location paramount to all claims or rights to lands which were public at the date of its passage, all subsequent locations could only be made subject to rights and claims existing when the new location was fixed; and the general law of 1875 authorized all locations to be made upon the same conditions. Construing the Act of 1875, which, like this, was a grant *in praesenti*, this court said in Wash. & Id. R. Co. v. Osborne, 160 U. S. 103:

"It would not be easy to suppose that congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.

"Accordingly, when we examine the act of March 3rd, 1875 (18 Stat. 482) upon which the plaintiff rests its claim of right to appropriate to their use, without compensation, the lands and improvements of Osborn, we find, in the third section, an express provision saving the rights of settlers in possession. That section is in the following terms: 'That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned, and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1st, 1862,' approved again July 2nd, 1864.'

"The legislature of the territory of Idaho. in pursuance of said third section, did provide a law for the condemnation by railroad companies of the right of way over possessory claims (Rev. St. Idaho, tit. 7, p. 576), and undoubtedly the defendant's claim was a possessory one, within the meaning of the legislation of congress. Indeed, as we have seen, the plaintiff company recognized the applicability of this section, and instituted proceedings of condemnation under the Idaho act before it occurred to it to ask the aid of a court of equity in taking possession of the defendan't lands, and improvements, wthout compensaton."

We invite attention to the substantially similar provisions in the Northern Pacific Charter and the act of Dakota, quoted (*ante* p. 3).

But even if this had been an action to recover the value of the property and damages for its use (assuming that it had been taken and used for railroad purposes) we submit that the plain-

tiff could have recovered under the authority of Ry. Co. v. Zeigler, 167 U. S. 65, where the court say:

> "While it is true that at the time when the company took possession of the plaintiff's land the latter had not yet received his patent, but had only made the final proofs, and filed the same in the land office of the United States, and had tendered the purchase price thereof, and had demanded from the register and receiver of said land office a final receipt evidencing his entry of and payment for said land, yet it further appears that before the plaintiff brought this suit his purchase money had been accepted, and a patent from the United States for the said tract of land had been duly executed and delivered to him. The plaintiff, then, having been in possession of the land in question, and having done and performed all that the law required to give him the right to a patent, before the railroad company seized the land, *we think the grant of the patent subsequent to such seizure, but before the bringing of the suit, operated to confer upon the plaintiff the right to demand and recover damages as the owner of the fee.* The railroad company, having taken possession without the consent of the owner, and not having instituted proceedings to condemn, was a trespasser, and liable to indemnify the plaintiff in respect to his possession and title, as they were shown to exist at the time the suit was brought."

Counsel several times refers to the action of the railroad company in "staking out a line" across the eighty-acre tract in the year 1872, and implies, if we understand him, that this was an act of "occupancy" within the meaning of the townsite act. There are at least three conclusive answers to this:

In the *first* place, "staking out a line" within 200 feet of a lot is not "occupancy" of such lot within the meaning of the townsite act. In the *second* place, the occupancy must be for "*town*" purposes; not railroad purposes. In the *third* place, whatever rights might have otherwise been claimed to arise therefrom, the grading and filing a map of a line of definite location more than two miles away operated as an abandonment of the "staked" line and a loss of all rights thereunder.

Counsel says "no doubt the location by the Railroad Company brought the population."

The townsite was located in the year 1872 and more than thirty buildings were erected thereon in that year. The railroad was not built there till June, 1873. It is difficult to see how a railroad built in 1873 could have attracted population in 1872, or how a railroad graded in 1872 through section 17 could have attracted population to a townsite on section 4, two miles away.

Counsel also says "the Railroad Company had therefore been in open, notorious and constant possession of this property, as part of its right of way, yards and depot grounds, for over six years at the least before the plaintiff obtained the deed upon which this ejectment is founded." There is not a word in the record to support this statement, except the allegation in the answer, which counsel, throughout both of his briefs, seems to consider paramount in effect to the findings.

There is not even an inference in the findings that there has been any occupancy for railroad purposes by anyone, except as to the rear twenty-five feet of the premises, and that portion may well have been occupied by others transacting warehouse business with the railroad company.

VII.

The doctrine of Roberts v. Railroad Co. does not apply and ejectment may be maintained.

It necesarily follows that, as there is no finding that these premises were ever occupied for railroad purposes nor that they are "necessary and proper for the construction and working of the road," none of the doctrines announced or authorities cited in Roberts v. N. P. R. R. Co., 158 U. S. 1, are in point; for, as there stated "The foregoing observations apply only to those

portions of the lands in question *which have been actually occupied and used by the railroad company for corporate purposes.*" They certainly cannot apply to lands occupied by "tenants." This company was not chartered as a *landlord.*

It likewise follows that the railroad company cannot resist ejectment as to such lands, if indeed it could as to its roadbed.

It is stated in Elliot on Railroads, vol. 3, sec. 1055:

> "The adjudged cases declare that a company that enters without right, may be ousted by an action of ejectment."

In Western Pa. R. R. Co. v. Johnston, 59 Pa. St. 290, the court said:

> "The plainitff who has never parted with his rights stands on the higher fundamental right of property; that it shall be taken and used by no one for the public purpose of a railroad without just compensation being made to him. This is a sacred constitutional right not to be spirited away by refinement."

In Justice v. Railroad Co., 87 Pa. St. 28, the court said:

> "The facts exhibit no outrage in the taking of the property, but the entry was clearly a trespass. No bond having been filed and approved according to law, the entry was irregular and subjected the company to an action of ejectment. * * * For the latter the owner has his appropriate remedies; his action of ejectment to recover and retain his land, and its use until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been caused by these illegal acts."

In Rusch v. R. R. Co., 54 Wis. 136, it was said:

> "No specific claim is made in the answer that the plaintiff ever consented to the use of his land by the defendant, and the undisputed testimony is that he did not, unless such consent is to be implied from his failure to

order the company off his land, or from his delay in bringing this action. We think no consent can properly be presumed from such failure or delay. Speaking no word and doing no act from which consent can reasonably be inferred, he might proceed to recover his damages or land at his leisure, within the limitations of the statute."

In the case of Daniels v. R. R. Co., 35 Iowa 129, the distinction between this case and those cited by the court in Roberts v. N. P. R. Co., is thus stated:

"There is to our minds a well-defined and reasonable distinction between an action which has for its object the recovery of damages for property taken and which, when recovered, *establishes in the defendant a right to continue possession;* and one which *denies the right of possession and seeks to recover.* Upon principle it would seem that the right to maintain an action of ejectment must exist if the defendant's possession is wrongful. Upon page 335 of Redfield on the Law of Railways it is said: 'If the railway company have assumed to appropriate the land, in violation of the provisions of the statute to be complied with on their part, their acts are ordinarily to be regarded as trespasses.' See cases cited in note 2. And on page 364 it is said: 'It has been considered that if the company enter upon lands without complying with the requisites of the statute, they are liable in trespass or ejectment.' "

In Jones v. Railway Co., 70 Ala. 227, the court said:

"The railroad company in this case having entered on the lands without the consent of the owner, without condemnation by statutory proceedings, and without payment of compensation, was a trespasser, and the owner might have maintained trespass or ejectment against it, or enjoined by bill in equity the construction of its road until compensation to him was ascertained and paid."

VIII.

The charter contemplated the filing of a map of the line of definite location and limited the grant of right of way thereto.

We contend that congress contemplated that this map should be what the words import and that it made provision for surveys to enable it to be such. In this respect it differs from the general law of 1875, which made no such provision.

And this was for a very good reason. The Pacific Railroads,were chartered and endowed with munificent grants upon the theory that there was such a government necessity for their speedy construction as would justify hastening the public surveys along their routes. These routes were specified *generally* in the charters. It was further provided that maps of general routes were first to be filed, *whereupon* the odd sections within the granted limits were to be *withdrawn*. This, certainly, contemplated a survey upon which such withdrawals could be based. *Afterwards* a map of definite location was to be made, presumably (as the circuit court of appeals well said) *after careful and exact surveys*. As the map of definite location had only the two purposes of fixing the right of way and the lateral limits of the land to be patented to the company, there was *no necessity* for filing it until just before construction began; because its earlier filing would not facilitate either of the purposes for which it was to be filed.

The company was, therefore, not *required* to file its map of definite location in advance of the public surveys and it does not appear that it did so. On the contrary, those surveys were made in 1872. The plat of the surveys was filed in March, 1873, and the map of definite location in May, 1873.

That is the construction which has been given to this very charter by the Department, 21 L. D. 412, where it is said:

> "Section 3 of the act requires that the line of road be definitely fixed by filing a plat thereof in the office of the commissioner of the general land office, and authorizes the selection of indemnity for lands then ascertained to be lost to the grant, for stated causes. * * *
>
> "Section 6 of the act contemplates that, prior to definite location, 'the general route shall be fixed,' by filing a map of the same; *whereupon* the odd sections, within the granted limits, on each side of the line, were to be excluded from sale, entry or pre-emption *until the definite location is made.*"

Counsel says, upon page 14 of his brief, "Not a map was ever filed, or ever requested by the department, on a scale large enough and with sufficient detail of reference so it *could* fix the right of way," and yet, upon page 17, referring to the map filed in that department with the report of the commissioners, he says:

"Attached to this report was an *accurate map, showing the exact location of the constructed road.*"

That report is "Exhibit 2," which, by stipulation (Record, Fol. 53) it was agreed might be used on this argument. We invite the court's careful scrutiny of the map, from which it will appear that it scarcely more accurately locates the line than did the map of definite location. The fact is that, like every map of any considerable size that was ever made from any survey, reference to field notes is necessary to determine with exactness the limits, unless the courses and distances are given on the map. As we have shown in our former brief, these courses and distances are fully available (Record, Fol. 38).

That this has been the understanding of the Department is evident from the following extract from the decision of the Secretary in Collett v. Ry. Co., 24 L. D. 181:

> "The maps, text books, and official plats of survey on file in your office must be the guide—there can be no other or better guide—as to the location of railroad lines,

and the distances therefrom of lands in conflict between railroad companies and settlers."

In 18 L. D. 510, the Secretary says:

> "The department has never approved maps of constructed road except in instances where maps of definite location had not theretofore been approved, and the maps of constructed road were held, for the purpose of approval, to be maps of definite location as well."

Considering a map of definite location of a canal, filed under a similar provision, the Secretary said, 15 L. D. 476:

> "The department not only has the right, but it is its duty to see that the lines are so fixed and determined that the patentee may know what he is receiving of the government when he takes its patent for the land over which this canal is constructed. I therefore return this map without my approval."

And, in 14 L. D. 118, as follows:

> "The law does not authorize the construction of railroad companies on the public lands beyond the line of the *right of way secured by the approval of a map of definite location.*"

In Noble v. Union R. L. Ry. Co., 147 U. S. 165, the court had under consideration a case where a railroad company, availing itself of the provisions of the general law of 1875, had filed a map of definite location which had been approved by the Secretary of the Interior. His successor in office attempted to annul the grant. The court said:

> "The lands over which the right of way was granted were public lands, subject to the operation of the statute; and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the secretary of the interior to decide, and, when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company."

It is not necessary to hold that, even where such right has

vested, it may not be lost by abandonment, and, in such case, there is no reason why a re-location may not be allowed where the government does not object, provided no other rights would be injuriously affected thereby. This idea was thus expressed in 21 L. D. 250, where, referring to the act of 1875, the Secretary says:

> "The filing of the map of location within the time prescribed by the act fixes the right of the road as to all lands which shall be traversed by it, and after the road is so located, all lands upon the line thereof, * * *
>
> "But I can see no reason why the company should be denied the right to file a new map of location at any time thereafter, even after the expiration of the five years, *to operate upon only such portions of the public lands as are free from every claim of right at the date of the approval of the new map of location.*"

On the other hand, the theory of the general law of 1875 was entirely different. It was not known when or where the roads which might avail themselves of its provisions would be built. There could be no grant *in praesenti* to them, in the same sense, because those that were to come into existence thereafter, would come under its terms as well as those existing when the act of 1875 was passed. Consequently a map of definite location filed under that act before construction might well be held to operate only to preserve the right of way until construction and to be unnecessary where the road had already been constructed; because, by such construction, the purpose of the grant had been attained. But as *construction*, under the act of 1875, took the place of the *map of definite location* under the land-grant acts, the same exception in favor of "possessory rights" existing at date of construction, which this court has recognized under the act of 1875, should be recognized at date of filing of map of definite location under the charter, as to all lands not covered thereby, when construction is changed to such lands.

The cases of Dak. C. R. Co. v. Downey, 8 L. D. 115, and R. R. Co. v. Maloney, 24 L. D. 460, cited by counsel for plaintiff in error, hold no more than that, under the act of 1875, a railroad company which has actually selected and used for station purposes "prior to any settlement by a homesteader, unsurveyed lands afterwards embraced in his entry, has a paramount right thereto, even though its plat be filed thereafter. This does not militate against our contention, in the least.

And we contend that such has been the construction of the Department.

Perhaps the Department has never more closely ruled upon the question at bar than in the matter reported in 1 L. D. 412, which arose upon the application of this same railroad company for indemnity lands by reason of loss of lands east of Thomson, Minnesota, that being its eastern terminus, as shown by its map of definite location, whereas its line extended as far east as Ashland, Wis. The Secretary says:

> "The absolute and unquestioned right to select and determine finally the initial point or terminus, as here contended for, can not be conceded. The law never intended to vest such absolute power in the railroad company. It requires in all cases that the line of location must be approved by the land department. A company may file a dozen maps, but no rights will accrue thereby to it without the approval of this department. Van Wyck v. Knevals, 106 U. S. 360, 366. * * *
>
> "*And these requirements as to the filing and approval of maps relate to all parts of the proposed route from beginning to end*, including the termini. * * *
>
> "It is a well settled rule of law that the powers of a legislative corporation are such only as are conferred by statute; the charter is the measure of power, and the enumeration of those powers is the exclusion of others. (Thomas v. N. P. R. R. Co., 101 U. S. 71, 82.) It is likewise well settled that where authority is given to do an act, *that power is exhausted when once exercised*, unless it clearly appears that it was intended the exercise

thereof was to be continuous. (East Tenn. etc. Ry. v. Frasier, 139 U. S. 288.) It will not be contended in the present instance that authority was given to the Northern Pacific Railroad Company to establish more than one point or terminus on Lake Superior, or to continue to establish points or termini at different places, from time to time as might meet the views of its changing officers, and the rule seems to be wthout exception that, where authority to locate a railroad is given to a company, when that location is made, the power is exhausted, and the company *can not thereafter change that location at will.* (Pierce on Railroads, 254, 255; Delaware Canal Co. v. Erie R. R. Co., 9 Paige 328; State v. Norwalk, etc. Co., 10 Conn. Rep; Mason v. Brooklynd R. R. Co., 35 Barb. 374; People v. N. Y. & Hudson R. R. Co., 45 Barb. 73; Van Wyck v. Knevals, 106, U. S. 366)."

Another decision of the Department which, it seems to us, should have great influence here, was that in Florida Central and Peninsular R. R. Co., v. Bell et al., 22 L. D. 452, where the Secretary says:

"There can be little doubt as a general proposition that a railroad may deviate in construction from its line of definite location, rendered necessary to avoid engineering obstacles or remedy defects in the original location, not destroying the identity of the road constructed with the one located and confined within the limits of the grant, and that the right of the company to the lands conferred by the grant will not be defeated thereby. It was so held by the Supreme Court in the case of Van Wyck v. Knevals (106 U. S. 360), and by the decision of Secretary Lamar in the Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 6 L. D. 209, in which the law and decisions affecting this question are reviewed at length.

"But unless it be concluded that the lateral lines of the company's grant are extended across the reservation in question, *then an analogous application of this rule to a right of way only, would confine the company to the limits of its line of definite location*, the width of which, in the absence of statutory designation, would be confined to such territory as the necessities of the

road require, and any further deflection would *be an abandonment of its definite location, and therefore of its right of way* * * *

"There does not appear to be any good reason for extending these lateral lines. It would serve no other purpose than to secure to the company the right to change its line of constructed road a distance of some 6 miles on either side of its definite location, and thus practically reserve from disposition a tract of land 12 miles wide, until the company has actually constructed its line, or render uncertain the title of every man who makes entry of any of said lands. I do not believe that congress so intended. A right of way was granted over this reservation on any line the company might select. Until this selection was made it was the duty of the government to take no steps that would interfere with the free exercise of this right. The selection was made in this case by filing a map of definite location. The right granted had then been exercised and exhausted, so far as the rights of others are concerned.

"I do not so understand the Baldwin case. At the date of the grant to the plaintiff company in that case the land in controversy was vacant and unoccupied land of the United States.

"Baldwin acquired whatever rights he possessed two years prior to definite location. The company contended that Baldwin took the land subject to the right of way; Baldwin contended that the grant of the right of way took effect only from the date at which the company filed its map designating the route with the Secretary of the Interior. * * *

"It is evident that the court had under consideration a very different case than the one here presented. *There was no deflection of line from definite location.* The road was actually constructed on the line selected by the company and approved by the department. The case does not hold anything except that such a grant 'is absolute and *in praesenti*, and a party subsequently

acquiring a parcel of such lands takes it subject' to the right of way.

"The case at bar is different in two important particulars. The homestead and pre-emption claimants herein do not seek to acquire title to lands over which a railroad company has selected its right of way by map of definite location, nor did the company build on its line of definite location. That the grants of right of way and of lands in aid of the construction of plaintiff company's road were grants *in praesenti;* that these grants were afloat until the line of the road was definitely fixed, and that then the selection of the lands and of the right of way was made thereby, and the right to lands and easements thus selected vested in the company as of the date of the grant, are propositions well settled. See Railroad Company v. Dunmeyer, 113 U. S.; St. P. & P. R. R. Co., 139 U. S., and cases cited. But these principles do not sustain the contention of the plaintiff company herein. The grant of right of way to the Florida Central & Peninsular R. R. across the Fort Brooke Reservation was a grant *in praesenti* and *attached on definite location after the date of the grant, but it did not attach to the whole reservation.* The map of definite location was a designation of the land selected for the purposes of the right of way, and the company's right attached to these lands as of the date of the grant, and by this act all other lands within the reservation were released from the company's claim. If the government were the only party in interest the same cogent reasons would not exist for invoking a strict interpretation of the law, inasmuch as it would make no difference to the government at what point the railroad crossed the reservation, but I am of the opinion that the company has no legal right to materially deflect its road from its line of definite location, and where adverse rights have attached to lands affected thereby, the land department will not embarrass the remedy of the legal title holders of such lands against the company in the courts, by making reservations of rights of way in the patents to be issued to the owners of the land."

In the case of M. K. & T. Ry. Co. v. Roberts, 152 U. S. 114, cited by counsel, the court had under consideration only the relative rights of the railroad company and one claiming, under a patent from the state of Kansas, a part of section 16, claimed to have been acquired by the state as a "school section." It was located within the limits of what was, at the date of the grant to the company, an Indian reservation, and the court held that the state obtained no title. As to the grant of the right of way through such reservation, the provision was, "the right of way, 200 feet in width, is hereby granted, subject to the approval of the president of the United States." Therefore, having constructed the road upon a line approved by the president, the company had *exactly complied with the conditions of the grant* in respect of right of way through the reservation. There was no provision expressly or impliedly authorizing the acquisition of the right of way through the reservation by the filing of a map of definite location in the general land office and the approval thereof by the secretary of the interior. That matter was committed by congress to the president, as the treaty-making power. Nor was there any question of change of location. It was in view of such a situation that the court, after reciting the terms of the grant, as above stated, and the approval by the president and the construction of the road upon the line thus approved, said, as quoted by counsel, "The right of way for its road, 200 feet in width, was granted to the company unconditionally, *subject only to such approval.* The title to the land for the 200 feet in width thus granted vested in the company, either upon the passage of the act of con-

gress, July 26, 1866, or upon the construction of the road, and, *so far as the present case is concerned, it does not matter which date be taken.*" It is evident that no question involved in this case was there presented or considered.

The case of Bybee v. Or. & Cal. R. Co., 139 U. S. 663, involved no question of map of definite location nor of change of right of way. The same is true as to the case of Flint & P. M. Ry. Co. v. Gordon, 41 Mich. 420.

Moreover this case is expressly disapproved in an able opinion by Justice Mitchell in R. R. Co. v. Sture, 32 Minn. 95.

IX.

The action of the commissioners appointed to examine the constructed road had no effect so far as its title to right of way, is concerned.

Counsel lays great stress upon the so-called "approval" by the President of the report of commissioners appointed to examine the character of the road. In addition to what we have said upon this subject in our former brief, we submit that it was no part of the functions of these commissioners to submit any map; there was no provision for filing or accepting or approving any such map, and neither the recommendation nor the approval referred to the map, and if they did, such action would have been ineffectual.

Counsel has quoted from the decision of Secretary Lamar, *In re* Chicago, St. P., M. & O. R. Co., 6. L. D. 205. We further quote therefrom as follows:

> "When the line of a land grant railroad has once been definitely fixed by the filing and acceptance of its map, there is no authority to change that location except the legislative; and in the absence of a legislative sanction the action of the land authorities in allowing or recognizing such change can neither confer nor take away rights."

As to the claim that it is not usual to insert in patents of lands traversed by rights of way an exception thereof, we understand the rule to be that, where the granting act does not provide that public lands liable to be affected thereby shall pass subject thereto, (as is the case in the general law of 1875) and where it does not appear that, at the time such lands are patented, the railroad grant has been forfeited, *it is necessary* that such exception should be made in the patent or it cannot be claimed to exist. In the case of *ex parte* Arnett, 20 L. D. 131, cited by counsel as an authority to the contrary, it was said:

> "In the absence of such statutory protection, and it not appearing that the rights of the company had been forfeited by legislative enactment, or judicial determination, it became the duty of the land department to insert the right of way clause in all patents issued for lands over which such right of way had been granted."

And the same doctrine is re-iterated in Dunlap v. Ry. Co., 23 L. D. 67, likewise cited by counsel on the same point.

X.

The plea for reversal upon grounds of expediency should not prevail.

The burden of the third division of counsel's brief seems to be that, without regard to logical construction, established rules of law and the settled doctrine of this court, this case should be reversed for the convenience of this and other land-grant railroad companies.

While we are aware that questions of expediency have sometimes influenced the decisions of courts of law, we respectfully suggest that the exigencies of the situation do not warrant such an appeal to this august tribunal. As we have

endeavored to point out in our former brief, there are many reasons why the established rules of law should prevail in this case. As already stated, we do not seek to disturb the possession of one foot of ground that is or ever was occupied for track, road-bed, yard or depot-grounds. The judgment can be affirmed without affecting the rights of this or any other company in either of these respects. Moreover, we repeat, that nearly twenty-five years have elapsed since this road was constructed to the Missouri River and fifteen years since it was completed to the Pacific Ocean. The statutes of limitation (prescription) of all the states west of Dakota bar all adverse claims in ten years or less.

We respectfully submit that adherence by this court to the doctrine announced in M. K. & T. Ry. Co. v. Cook, as the only logical culmination of repeated decisions to the same general effect, will not only preserve its consistency, but will tend to that security of titles and certainty of boundaries which it is the object of courts to conserve.

Respectfully submitted,

H. F. STEVENS,

Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 93.

THE NORTHERN PACIFIC RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

PATRICK R. SMITH, DEFENDANT IN ERROR.

Documents Relating to Original Reply and Error in Transcription Thereof.

H. F. STEVENS,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-19-'98

IN THE

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vs.

PATRICK R. SMITH, DEFENDANT IN ERROR.

Documents Relating to Original Reply and Error in Transcription Thereof.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

PATRICK R. SMITH, *Plaintiff*,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, *Defendant*.

Reply.

Said plaintiff, for reply to the amended answer of said defendant, admits that on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial dis-

trict for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action; but he alleges and avers that said action in said district court has been duly dismissed without prejudice to the plaintiff or to his right to maintain another action in any court whatsoever, and that there is now no other action pending in any court between the parties to this action involving the issues or cause of action involved in this action or any *or any* part of the same.

He denies that the land mentioned in the complaint has been for more than twenty years, or for any other or greater or lesser period, or for any period whatsoever, in the lawful possession of the defendant as its right of way, road-bed, and depot grounds, or for any other purpose or in any other manner whatsoever; but he admits and avers that the southerly half of said premises has been unlawfully used and possessed by said defendant, partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same, for purposes connected with the shipment and receipt of freight to and from the railroad of said defendant, for a period of eight years last past, and that the northerly half of said premises has been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same, and that such occupation has not been for any of the purposes or uses mentioned in said answer.

He denies that said land or any part thereof has been in the possession of said defendant for twenty years, whether as stated in said answer or otherwise.

He denies that said defendant recovered judgment against the plaintiff on the 31st day of January, 1878, as stated in said answer, or at any other time or in any other manner whatsoever, and he denies that there is any such judgment as therein stated or any judgment against him in favor of said defendant in full force, unreversed, and unsatisfied or otherwise.

Wherefore said plaintiff again demands judgment as prayed for in his complaint, notwithstanding anything in said answer contained.

F. H. REGISTER,
Attorney for Plaintiff, Bismarck, N. D.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Patrick R. Smith, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing *answer* and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated upon his information and belief, and that as to those matters he believes it to be true.

PATRICK R. SMITH.

Subscribed and sworn to before me this 4th day of April, 1892.

[SEAL.] M. P. SKEELS,
Notary Public, Burleigh Co., North Dakota.

UNITED STATES OF AMERICA, } ss:
District of North Dakota, }

IN THE CIRCUIT COURT.

I, J. A. Montgomery, clerk of the circuit court in and for the district of North Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete copy of the original reply in the above-entitled action as the same now remains on file in said office.

Witness my hand and the seal of said court, at Bismarck, in said district, this 22d day of January, 1898.

[SEAL.] J. A. MONTGOMERY, *Clerk,*
By R. D. HOSKINS, *Deputy.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1897.

NORTHERN PACIFIC RAILROAD COMPANY ET AL., *Plaintiffs in Error*,
vs.
PATRICK R. SMITH, *Defendant in Error.*

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

Hiram F. Stevens, being of lawful age, after being duly sworn, deposes and says that the original reply in the above-entitled action, which was filed in the circuit court of the United States for the district of North Dakota on the fifth day of April, A. D. 1892, and which has been transmitted from said court to and for inspection by the Supreme Court of the United States, pursuant to the provisions of the fourth subdivision of rule eight of said last-named court, is in the handwriting of this affiant; that the erasure of the last three letters of the word "eighteen," occurring therein, was made by him before said reply was filed; that no change has ever been made in said reply since it was so filed; that the type-written copy thereof prefixed to this affidavit, exclusive of the clerk's certificate at the end thereof, was made at Bismarck, in the State of North Dakota, by some one whom affiant does not now remember, between the fourth and ninth days of April, A. D. 1892, at affiant's request, and was, on the ninth or tenth day of said April, brought by affiant to his office in St. Paul, in the State of Minnesota, and there remained in his files, undisturbed and unchanged, until about the 20th day of January, A. D. 1898, when it was found by affiant in its present condition among said files; that thereupon affiant transmitted the same to R. D. Hoskins, deputy clerk of said circuit court, with the request that he compare the same with the original and, if found correct, certify and return the same to affiant, which was done;

that in the printed record upon the first writ of error in said action, issued by the circuit court of appeals for the eighth circuit to said circuit court of North Dakota, a copy of which is herewith presented, said word appears as "eight;" that affiant never knew, until his attention was called to the fact by one of the justices of this honorable court upon the former argument, that said word appeared in the printed record in this court as "eighteen;" and further affiant saith not, save that this affidavit is submitted to be considered, if proper, in connection with the inspection of said original reply, pursuant to the provisions of said rule eight.

HIRAM F. STEVENS.

Subscribed and sworn to before me this 18th day of March, A. D. 1898.

[SEAL.] JAMES D. MAHER,
Notary Public.

UNITED STATES OF AMERICA, }
District of North Dakota, } *ss:*

IN CIRCUIT COURT.

I, R. D. Hoskins, deputy clerk of said court, do hereby certify that on the 22d day of January, A. D. 1898, I compared a typewritten copy of the reply in the case of Patrick R. Smith, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant, with the original thereof which was filed in this court on the 5th day of April, A. D. 1892, at the request of H. F. Stevens, which typewritten copy was presented to me, at Bismarck, by P. E. Byrne; that I called the attention of said Byrne at the time to the fact that the words "for a period of eight years last past," as contained in said typewritten copy, appeared upon the original as having been written originally "for a period of eighteen years last past," but that the last three letters of the word "eighteen" had been erased; but we both concluded that as

filed it read "eight" years, and I certified to said typewritten copy for that reason.

That thereafterwards I was called upon by one Alexander Hughes, who is and was the local attorney of the defendant in said action, and was requested by him to make a certificate, which I did, to the effect that the word in question was originally written "eighteen," and that the last three letters had been erased, but when or by whom I could not state.

I hereby certify that I did not intend by my said last certificate to intimate that said erasure had been made improperly, and I now find that in the certified copy of said reply which was furnished at the time of the first writ of error from the United States circuit court of appeals for the eighth circuit, as evidenced by a certified copy of same from the clerk of said court, the word was written "eight;" and I further certify that I have no reason to believe that said reply had been changed since it was originally filed.

I further certify that the accompanying two photographs—the one purporting to show the page of said reply upon which said word occurs, and the other showing a portion of the same, including the word in question, upon an enlarged scale—are photographs from said original made by A. E. Boyce, a photographer, at said Bismarck.

Witness my hand and the seal of said court, at Bismarck, in said district, this 25th day of February, A. D. 1898.

[SEAL.] R. D. HOSKINS,
Deputy Clerk.

(Here follow photographs.)

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

PATRICK R. SMITH, *Plaintiff*,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, *Defendant.*

Reply.

The plaintiff, for reply to the amended answer of said defendant, admits that on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial district of the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action; but he alleges and avers that said action in said district court has been duly dismissed without prejudice to the plaintiff or to his right to maintain another action in any court whatsoever, and that there is now no other action pending in any court between the parties to this action involving the issues or cause of action involved in this action or any *or any* part of the same.

He denies that the land mentioned in the complaint has been for more than twenty years, or for any other or greater or lesser period, or for any period whatsoever, in the lawful possession of the defendant as its right of way, road-bed, and depot grounds, or for any other purpose, or in any other manner whatsoever; but he admits and avers that the southerly half of said premises has been unlawfully used and possessed by said defendant, partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same, for purposes connected with the shipment and receipt of freight to and from the railroad of said defendant, for a period of eight years last past, and that the northerly half of said premises has been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same, and that such

occupation has not been for any of the purposes or uses mentioned in said answer.

He denies that said land or any part thereof has been in the possession of said defendant for twenty years, whether as stated in said answer or otherwise.

He denies that said defendant recovered judgment against the plaintiff on the 31st day of January, 1878, as stated in said answer, or at any other time or in any other manner whatsoever, and he denies that there is any such judgment as therein stated or any judgment against him in favor of said defendant in full force, unreversed, and unsatisfied or otherwise.

Wherefore said plaintiff again demands judgment as prayed for in his complaint, notwithstanding anything in said answer contained.

F. H. REGISTER,
Attorney for Plaintiff, Bismarck, N. D.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

Patrick R. Smith, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing *answer* and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated upon his information and belief, and that as to those matters he believes it to be true.

PATRICK R. SMITH.

Subscribed and sworn to before me this 4th day of April, 1892.

[SEAL.] M. P. SKEELS,
Notary Public, Burleigh Co., North Dakota.

On the back of said reply appear endorsements in words and figures following, to wit:

20. In the circuit court of the United States for the district of North Dakota. Patrick R. Smith, pl't'ff, *vs.* The Northern Pacific Railroad Co., def't. Reply. Due service at Bismarck, N. D., this 4th day of April, A. D. 1892, of the within reply is hereby admitted. Alexander Hughes, att'y for def't. Filed Ap'l 5th, 1892. J. A. Montgomery, clerk. F. H. Register, att'y for pl't'ff.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing pages, numbered from one and two, inclusive, contain a true copy of the reply as contained in the original transcript of record in the case of Patrick R. Smith, plaintiff in error, *vs.* The Northern Pacific Railroad Company, No. 201, May term, 1893, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 22d day of February, A. D. 1898.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.